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RECENT LEGISLATION.

An act to amend an act, entitled "An act to establish a Superior Court, and to regulate the same," approved April 22, 1882. (3 Ky. Law Rep., 699.)

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. That the first section of an act, entitled "An act to establish a Superior Court, and to regulate the same," approved April 22, 1882, be, and the same is hereby, amended by inserting after the figures "1886" therein the following: On the first Monday in August, 1886, there shall be elected by the qualified voters of this Commonwealth three persons as judges of said court, whose term of office shall commence on the first Monday in September, 1886, and continue until the first Monday in September, 1890.

Sec. 2. Whenever the judges can not sit in any case taken to that court by law the court shall certify that fact, thereupon the clerk shall transfer said case to the docket of the Court of Appeals, and the case shall be decided by that court.

Sec. 3. That the fifth section of the said act of April 22, 1882, be, and the same is hereby, amended by striking out the words "one thousand," wherever they occur in the fifth and sixth lines of said section fifth, and inserting in lieu thereof

the words "two thousand," provided that the same officers who wait upon and attend the Court of Appeals shall wait upon the Superior Court without any additional compensation for such services.

Sec. 4. This act shall take effect from and after its passage.
Approved.

The Legislature of Kentucky at its recent session made some material changes in the Civil Code of Practice. The amendments are as follows:

Section 601, which provides for the exclusion of witnesses from the court room, is amended by adding: "But this rule shall not apply to the parties to the action or to the officers of the court." Approved May 7, 1886.

Section 334, which provides that time may be given to a day in the succeeding term to prepare a bill of exceptions, is amended by adding: "If the judge of said court for any cause does not preside at the said term of the court, or no court is held, then the party offering the bill of exceptions shall have until the next term of the court to perfect and prepare the bill of exceptions." Approved May 12, 1886.

Section 342 is "so amended as to allow the party applying for a new trial, where there is a special verdict only, to make his motion within three days after the court shall have rendered a judgment thereon." Approved May 15, 1886.

Section 553 is amended so as to read: "The deposition of a witness shall not be retaken without leave of the court, except in rebuttal." Approved May 15, 1886.

Section 475, which refers to writs of mandamus and prohibition, is amended by adding the words: "The court may, after granting such writ, upon application of the plaintiff, besides or instead of proceeding against the defendant by attachment, direct that the act required to be done may be done by some other person appointed by the court at the expense of the defendant." Approved May 1, 1886.

Subsection 3 of section 203, which provides how an order of attachment shall be executed, is amended by adding: "But no notice need be given in any case describing or specifying the debt or demand attached, but only a notice that the person or corporation to whom the order of attachment is delivered is summoned to answer as a garnishee on or before the day and time on which the case is set for trial." Approved May 15, 1886.

"So much of chapter 2, title IX, as authorizes and provides for a separate, general or special verdict," is repealed, "provided that the court, in its discretion, may direct the jury to find a separate general verdict." Approved May 15, 1886.

Section 574, which provides that in certain cases the depositions must be taken upon interrogatories, is amended by excepting "actions and proceedings for divorce and alimony and the custody of children when involved in such a suit." Approved May 18, 1886.

Title XIX, chapter 4, is amended so as to allow the receiver of the Louisville Chancery Court to appoint one or more deputies.

Section 21 of the Criminal Code is amended so that "all prosecutions against persons publishing a newspaper for any libelous matter contained therein shall be had in the county where the same is printed and issued, or in the county where the party complaining resides." Approved May 18, 1886.

All of the foregoing amendments take effect from and after passage.

The exemption law passed at the recent session of the legislature does not apply to debts created prior to June 1, 1886.

Attention is called to the law card of Richards & Hines upon the cover of this number of the Reporter.

KENTUCKY COURT OF APPEALS.

HOFFENDORFER v. GAULT, &c.

(Filed May 1, 1886.)

Adverse possession—Whether possession of one without title is to be regarded as adverse or not depends always upon the intent with which the possession was taken and held, as it appears from the evidence; and if it can be made to appear that the possession, though continuous, was not intended to be adverse, and that the occupant, by words or acts, recognized and acknowledged the title of the true owner, it can not be said that the possession was adverse. Actual, exclusive occupancy or use, evidenced by inclosure, is but prima facie evidence of adverse possession.

In this action to recover land the defendants in 1868, less than fifteen years before the commencement of this action, actually purchased from the plaintiff and accepted from him a deed to land entirely inside the boundary they now claim to have adversely held since 1850, and even in their answer allege that the deed of 1868 was intended to include the very land in dispute.

Held—That the deed of 1868 should be held conclusive evidence that the possession of the land was not, previous to that date, intended by those occupying it to be held adversely.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

In a division of the lands of Eudocia Puryear, in the city of Louisville, made in 1843 between her heirs, Mary Lignon received a lot, described in the deed of partition as beginning at the intersection of Eighteenth and Broadway streets, running thence east with Broadway 210 feet, thence southward parallel with Eighteenth street, but diverging westward of a line perpendicular to Broadway.

The heirs of J. Puryear received in the same division an adjacent lot, described as beginning at Lignon's corner, on Broadway, running therewith east 112 feet; thence south at right angles thereto — feet; thence west parallel thereto to Lignon's line, and with it to the beginning. That lot was, in 1857, divided between two of the heirs of J. Puryear, Wilson and Woodward, the first named receiving a lot designated in that division as lot 4, being the western portion adjoining the Lignon lot, and the latter receiving the eastern portion designated as lot 3, each of the two lots fronting 56 feet on Broadway.

In 1849 Mary Lignon sold and conveyed the first-mentioned lot to Elizabeth Simmons, who died in 1865, leaving it to her four children, appellee, Mary Gault, being one of them.

In 1866 Wilson and Woodward sold and conveyed the two lots, 3 and 4, to appellant. And in 1868 he sold and conveyed to Mary Gault and her three brothers, Bernard, John and Robert Simmons, a part of lot 4 adjoining the Lignon lot, the part sold being described in the deed as follows: "Beginning at a point on the south side of Broadway, 210 feet east of Eighteenth street; thence southwardly with the west line of lot 4 as laid down in the plat recorded; * * thence eastwardly with the southern line of said lot * * to a point 112 feet west of the eastern line of lot 3; * * thence north to the beginning, making a triangle of the piece conveyed, and leaving lots 3 and 4 with a front of 112 feet and running back the same width, leaving 3 and 4 in the shape of a rectangle."

It will be perceived that the parcel of land thus described is in the form of a right-angled triangle, the hypotenuse of which is the original division line between the Lignon lot and lot 4, which ran from the corner on Broadway 210 feet east of Eighteenth street southward parallel with the latter; while the east line of the triangle, being the present division line between it and the part of lot 4 retained by appellant, runs south from the same corner on Broadway at right angles to it and to the back line.

But it appears that there is now, and has been since about 1850, a fence extending from Broadway to the back line of lot 4, which is nine or ten feet east of and parallel to the line dividing the triangle and the part of lot 4 retained by appellant as fixed and described in the deed of 1868. And appellee, Mary Gault, having by conveyances from her brothers acquired title to the eastern portion of the Lignon lot and to the triangle, and being in possession and claiming up to the fence, appellant brought this action against her and her husband to recover the narrow strip of nine or ten feet.

Two defenses are relied on in the answer: First, mistake in the description of the land contained in the deed of 1868, which the court is asked to correct; second, limitation.

In their answer appellees aver that when the deed was executed it was understood and agreed between appellant and the purchasers that the fence was the eastern boundary of the land intended to be conveyed, but by mistake the line was located nine or ten feet west of it.

There is no evidence whatever to support that averment. On the contrary, the particularity and precision with which it is stated in the deed that lots 3 and 4 were to be left with a front of 112 feet on Broadway, running back the same width, and that the part of lot 4 conveyed was in the shape of a triangle, show conclusively that the parties recognized the original corner on Broadway as being 210 feet east of Eighteenth street, and intended the division line between the part of lot 4 sold and that retained by appellant to run from that corner south at right angles to Broadway, leaving the narrow strip of nine or ten feet now in controversy entirely within the boundary of the unsold part of lot 4. For if the fence had been made the division line the land conveyed would not have been in the form of a triangle at all, nor would lots 3 and 4 have been left with a width of 112 feet.

It being then unquestionable that the land in controversy was intentionally excluded from the deed of 1868 and left inside the boundary of the unsold part of lot 4, as then recognized and agreed to by the parties, it is incumbent on appellees to show that they and those under whom they claim had the actual, continuous and adverse possession fifteen years next before the commencement of this action in 1880. But as it is shown that the narrow strip of nine or ten feet, as well as the triangular piece conveyed in 1868, have been inside the inclosure of those owning the Lignon lot since the year 1850, the simple inquiry is whether such possession had been, in legal contemplation, adverse for the length of time necessary to bar recovery by appellant.

Whether possession of a party without title is to be regarded as adverse or not depends always upon the intention with which the possession is taken and held, as it may appear from the evidence. As expressed by the Supreme Court of the United States, "the whole inquiry is reduced to the fact of entering and the intention to usurp possession," and, in legal language, the intention guides the entry and fixes its character. (Angell on Limitations, section 386, and authorities there cited.)

It is true this court said in 2 Duvall, 15, that "if the possession has been actual, continuous, and of a kind that furnishes the real owner a cause of action every day during the required time, it is adverse." And it has also been held that "actual, exclusive occupancy or use, evidenced by inclosure, continued for the required time" is a test. But we do not understand what the owner of the legal title to land has ever been held by this court precluded from showing that an entry and occupancy by one without title was in fact amicable and not adverse, and thus recovering, notwithstanding the possession may have continued the required time. For if it can be made to appear that the possession, though actual and continuous, was not intended to be adverse, and the occupier disclaimed title in himself, and by words or acts recognized and acknowledged the title of the true owner, it seems to us it would be an abuse of terms to say such possession was adverse.

In this case appellees, in 1868, less than fifteen years before the commencement of this action, actually purchased and accepted a deed from appellant for land entirely inside the boundary to which they now claim to have held adversely since 1850, and in the same deed by which they are bound it was expressly stipulated that lots 3 and 4 were left with a width, front and back, of 112 feet, which covers all the land in dispute. And in their answer they aver that deed was intended to include it as well as the triangle, thus admitting appellant's title and right to convey it at that time.

It seems to us that parties who set up no other claim to land than the mere naked possession should be held bound by their

own voluntary disclaimer of adverse possession, and that the deed of 1868 should be regarded as conclusive evidence that the possession of the land in dispute was not intended by those occupying it to be held previous to that time adversely to the true owners; and such has been the ruling of this court. (Croan v. Joyce, 3 Bush, 454.)

The judgment is, therefore, reversed and cause remanded for judgment in favor of the plaintiff in the action.

Lane & Burnett for appellant.

Arthur Cary for appellees.

KREIGER v. SHELBY R. R. CO., &c.

(Filed April 17, 1886.)

Railroad tax—Taxing district a stockholder—By the charter of a railroad company a portion of a county was laid off by a well-defined boundary, and the legal voters within that boundary were empowered to vote a subscription of stock, not exceeding a certain amount, to aid in the construction of the road. Bonds were required to be issued in the name of, and under the seal or scroll of, this portion of the county, to be signed by the county judge and delivered to the president and directors of the railroad company in payment of the subscription. The vote was taken favoring the enterprise, the subscriptions made by the county judge, and the bonds executed and delivered as required. The collecting officer was required by the provisions of the act "to execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and when they amount to \$50 or more shall entitle the holder, upon presentation to the proper officers of the company, to certificates of stock at the rate of one share for \$50 and every multiple of fifty." It was further provided that "the several counties and portions of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders." Held—That the district or portion of the county voting the tax is a stockholder in the company, and has a voice in the selection of its officers and a right to receive dividends declared. This district having voted the tax, and executed and delivered its bonds to the company in payment of its subscriptions, as it was empowered to do, it required no other provision to enable it to vote its stock or to become a stockholder. The district, however, will be deprived of its right to vote the stock or receive the dividends to the extent that the principal of the bonds may be reduced by the taxpayers.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

The original charter incorporating the Shelby Railroad Co., approved on the 15th of March, 1851, was amended by an act approved February 3, 1869, and from that amendment or its construction has arisen the present litigation.

By this amendment the company was authorized to extend its road through other counties as well as the county of Shelby, and by the second section of the amendatory act a portion of the county of Shelby was laid-off by a well-defined boundary, and the legal voters within that boundary empowered to vote a subscription of stock, not exceeding \$300,000, to aid in the construction of the road.

The vote was taken favoring the enterprise, and the subscription made by the county judge in accordance with the provisions of the act. Bonds were required to be issued payable in twenty years, bearing interest at a rate not exceeding 8 per cent., with the right reserved of paying them within three years from date. The bonds were required to be executed in the name of and under the seal or scroll of this portion of Shelby county, and to be signed by the county judge and countersigned by the county clerk, and when executed the bonds were to be "delivered to the president and directors of the railroad company in payment of said subscription, and they may be by them negotiated, hypothecated or sold, upon such terms as may by said president and directors be deemed expedient, and may be transferred by endorsement."

These bonds were executed and delivered, and then sold by the company and the proceeds applied to the building of the road. The road was completed from Anchorage, on the Louisville & Lexington road (now the Louisville & Nashville road), to the town of Shelbyville, a distance of eighteen miles.

Under the 7th section of the act of 1869 an annual tax was levied on all the property in the district subject to taxation for State revenue to pay the interest when due and the prin-

cipal at maturity, and this tax has been collected from year to year in payment of the interest and in part discharge of the principal.

The collecting officer is required by the express provisions of the act "to execute to each person a receipt for the amount of taxes paid by him, which shall be assignable, and when they amount to \$50 or more shall entitle the holder, upon presentation to the proper officers of the company, to certificates of stock at the rate of one share for \$50 and every multiple of fifty."

The 9th section of the act provides that "the several counties and portions of counties shall not vote the stock for which certificates may be issued to the taxpayers, but the same shall be voted by the individual stockholders."

The officers of this corporation being elected by the stockholders, it is claimed by the appellants, Kreiger and others, who are individual stockholders, that this district voting the tax is not a stockholder in the company, and, therefore, has no voice in the selection of its officers, nor any right to receive dividends declared; that so far as the district is concerned the individual taxpayer residing therein, when he has paid his taxes and obtained a certificate of stock, to that extent is entitled to vote, but no further, and this, it is insisted, is the only manner in which the district can be heard in the selection of the officers of the company and in the distribution of the dividends. These three consolidated cases each involve this question.

It is claimed that the appellants have purchased up the receipts of the taxpayer or his certificates for a trifling sum, and are, therefore, endeavoring to obtain the power to control the corporation.

Whatever may have been the motives influencing the appellants, the tax receipts are made assignable, and this must be treated as a controversy between the taxpayer and stockholder on the one side and the taxing district on the other.

It is apparent that at the completion of the road the stock was of but little value, and so continued for a number of years, yielding no dividend and giving no indications of a profitable investment. Shortly before the institution of the present actions a small dividend (perhaps two) was declared by the company, and this seems to have called the attention of the officers of the company and the stockholders to the necessity of having the charter construed with a view of ascertaining who had the right to vote the stock and receive dividends. Prior to the payment of these dividends the district had been voting its stock to the amount of \$300,000, and while this may indicate the construction placed upon the act by many of the parties in interest, we can not well see why it should work on the stockholders, or compel such a construction of the charter if inconsistent with its provisions.

The facts conduce to show that as much as \$300,000 has been paid by the taxpayers in the way of interest, and for this reason it is maintained that no right exists in the district to vote the original stock subscription. If \$300,000 has been paid by way of interest that by the terms of the charter can be converted into stock, it then follows that when this is added to the original subscription of \$300,000 that the district and the taxpayers had stock, or were entitled to stock, at the inception of these actions, amounting in all to the sum of \$600,000, and may have greatly more, as the bonds have not yet fully matured, and all the interest hereafter paid can be, under the charter, converted into stock. It is maintained that such was not the intention of the amendment of 1869, and the only stock that exists or can be voted is such stock as is or may be acquired by the taxpayer in the payment of the interest on these bonds and the principal as the bonds mature.

It is argued by appellant that no corporate right belonged to or was given to this district by the act in question, and no express or implied power to vote the stock or receive the divi-

dends. Further, that the stock had not been paid for and, therefore, by an express provision of the statute the district, if owning the stock, could not vote it until fully paid.

As to these propositions attempted to be maintained by counsel it is proper to refer to the original act of incorporation, to which the act of 1869 was an amendment, under which the county of Shelby and the town of Shelbyville were empowered to subscribe to this enterprise, and by the sixth section of the original act of incorporation, under which the stockholders were authorized to elect directors, "each stockholder was allowed one vote for every share owned by him, her or it." and the amended act in no manner changed or restricted this right as to any subsequent stockholder, whether a natural or artificial person.

The amended act creating this taxing district, and making its subscription to depend upon the popular vote, and requiring its bonds to be executed and delivered to the company by the county judge, under the name and seal or scroll of the district or the portion of Shelby county authorized to vote, made it a corporation, entitling it to all the rights and privileges of a stockholder. If this district had the power to vote the tax, to execute its bonds, with its seal and scroll, in payment of the tax, and did in fact sign and deliver its bonds to the company, through the county judge, in payment of its subscription, it required no other provision to enable it to vote its stock or to become a stockholder, but, on the contrary, it would require an express provision of the statute preventing the exercise of such a power before the right could be withheld. The stock was not only subscribed, but paid for by the delivery of its bonds, payable in twenty years, with 8 per cent. interest until maturity. These bonds were placed on the market and the money realized, and so far as the railroad company is concerned the stock subscription by the district has been fully paid, and the payment of the bonds is between the holder and the taxpayer. After the payment of this subscription in the bonds of the district, to say that the district is not entitled to the stock or the dividends is not warranted by either the letter

or the spirit of the act under which the subscription was made. A subscription of \$300,000 paid in bonds, bearing 8 per cent. interest, and still not a stockholder in the corporation, or entitled to its portion of any dividend declared, is repugnant to every provision of the charter, and to that idea of justice and equality that should prevail as between those investing in a common enterprise. There were no tax receipts at the date of the delivery of the bonds to be converted into stock, and the interest payable in each year by the individual taxpayer would not, for several years in many instances, entitle him to a certificate of stock, thus leaving a paid-up subscription sufficient to construct one-half the road, without representation for years in the selection of its officers, and without any right to receive a dividend. Such could not have been the legislative intent, nor is such a view the proper construction to be placed on the charter.

It is true the district is but the trustee of the taxpayer, and the dividends will lessen the tax imposed or discharge the liability of the taxpayer to that extent, but the right to vote the stock and receive the dividend is unquestioned.

It is, however, argued that the provisions of section 9 of the amended act excludes the idea that any other stock can be voted except that for which certificates have been issued to taxpayers. We think a construction of that section in connection with the entire charter, leaves but little room to doubt the right of the district to vote the stock originally subscribed. It may be that affirmative rights or powers are not to be deduced from a restraining statute, and, therefore, because portions of counties are prohibited from voting the stock for which certificates have been issued to the taxpayers, it does not follow that the district had the right to vote the original subscription of stock. It must be conceded that the original act of incorporation gave expressly to each stockholder a voice in the selection of its officers, and section 9 of the act of 1869 negatives the idea that the voting of stock with reference to this district was to be confined to taxpayers alone, but, on the

contrary, following both the letter and spirit of the charter, it clearly indicates that other stock is to be voted by the counties or portions of counties than that to be voted upon tax certificates. "The several counties or portions of counties shall not vote the stock for which certificates may be issued to taxpayers," etc. This is to be voted by the individual taxpayer or stockholder when obtaining his certificate, but as to the original stock subscription paid by the county, or a portion of the county, this is to be voted by the county or portion of the county.

Such is the plain letter of the original act, and without conferring the power in express terms upon the particular district the provision of the act authorizing a stockholder to vote entitles both natural and artificial persons, holders of stock, to vote it.

This portion of Shelby county will be deprived of its right to vote the stock or receive the dividends when the taxpayers discharge the principal and interest of its bonds, or to the extent the principal may be reduced by the taxpayer. When paid it becomes the stock of the taxpayer, and for this reason the chancellor below, finding the principal of the subscription reduced by the taxpayer, he only permitted the district to vote so much of the principal stock as remained unpaid, the taxing district being divested of its stock to the extent the principal had been paid by the taxpayer. The stock of a county in a corporation like this may be increased by permitting the interest paid to be converted into stock, and the original stock in this way doubled or trebled.

Such provisions are inserted in many charters, those provisions constituting the contract between the stockholders. The interest for twenty years on these bonds may be converted into stock because the charter authorizes it. Preference is often given in this way to counties, towns and districts to induce subscriptions and to place the corporation in such a financial condition as will enable it to dispose of bonds based on the credit of the county or district subscribing, and in this manner construct its road.

Individual subscriptions, except for small sums, are rarely ever made to such undertakings, and to hold that counties or portions of counties can subscribe and pay its stock, that in effect makes the enterprise a success, and still not a stockholder, is unreasonable, and certainly not warranted in the case being considered. In this case, if the principal should not be paid for twenty years from the date of the bonds, the interest stock would greatly exceed the principal, still such being the charter, we see no reason why its terms should not be enforced. The city of Louisville had no right to vote the stock subscribed, because no part of it had been paid. No bonds had been issued, and the tax collected from the taxpayer, evidenced by his receipt, constituted the principal stock. Neither the city nor the taxpayer paid any interest, but the principal stock paid by an annual levy. It is not insisted by the appellees that the district owns this stock in its own right, but that it holds it for the taxpayer, and is entitled to the dividends on the unpaid subscription to be applied to the reduction of the debt or to lessen the amount of the tax.

The fact that some of the bonds have been called in and others executed at a less rate of interest is for the benefit of the taxpayer, and can not be said to have satisfied the district indebtedness. The act of March 11, 1870, giving the county judge and justices the right to vote the stock, is but speaking the language of the charter. These financial agents of the county were made the agents of the particular district, and when subscribing the stock and issuing the bonds were entitled to vote in behalf of the stockholders. The act may be silent as to the mode of disposing of the dividends, but, as before stated, when applied, as they should be, to a reduction of the debt or the interest, it enures to the benefit of those entitled.

If the title of the act of March 11, 1870, is misleading and unconstitutional, so is the title to the act of February 3, 1869, under which all these rights have been acquired. We see no reason for holding either unconstitutional by reason of the title. It results, therefore, that the portion of Shelby county

voting this subscription has the right, through the county judge, etc., to vote the original stock subscription to the extent that it has not been reduced by the payment of a part of the principal by the taxpayer; that it has a right to receive the dividends on this stock and apply it to the reduction of the debt or the interest.

The judgment of the court below conforming to the views herein expressed is now affirmed.

Barnett, Noble & Barnett, Hargis & Eastin, L. A. Weakley and Isaac Caldwell for appellant.

Bullock & Beckham and Russell & Helm for Shelby R. R. Co.

Bullock & Beckham and P. J. Foree for Shelby Railroad District, of Shelby County.

MASONIC SAVINGS BANK v. BANGS' ADM'R.

(Filed May 5, 1886.)

1. Banks—Liens—Where securities are pledged to a banker for the payment of a particular loan or debt he has no lien on the securities for a general balance, or for the payment of other claims.

In this case appellee's intestate, to secure the payment of a note for borrowed money, pledged to appellant some shares of stock in a corporation and authorized the bank, by endorsement on the note, to sell the stock if the note was not paid at maturity. After the death of the pledger the bank, with the consent of his administrator, sold all the stock, and the proceeds being more than sufficient to satisfy the particular note to secure which the stock was pledged, the bank, having other claims against the estate, claims the right to apply the surplus to their payment. Held—That the surplus is for distribution among general creditors. The bank is not entitled to a lien thereon, or to a set-off against the claim of the administrator, the claim not being for a debt due the intestate.

2. Lien on decedent's estate—Where the personal estate of a decedent is covered by a lien giving a creditor priority, the residue, after satisfying the lien, must be paid to other creditors until they have received a sum equal pro rata with the lien creditor. This statutory provision applies to all liens created on the personal estate, whether by operation of law or by express contract between the parties.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Pryor.

John B. Bangs, in the month of June, 1884, borrowed of the Masonic Savings Bank the sum of \$10,000, for which he executed his note, payable in six months, with interest from date, and to secure its payment he pledged as collateral security 300 shares of the stock of the New Galt House Co. The nature of the pledge was endorsed on the back of the note, and is as follows: "As security for the payment of the within note I have deposited with the Masonic Savings Bank 300 shares of the capital stock of the New Galt House Co., and authorize the said bank to sell the above-described collaterals, and pass a good title thereto to the purchaser, if the within note is not paid at maturity, reserving the right to be notified in writing twenty days previous to the date and place of the contemplated sale."

Bangs, the obligor in the note, died intestate in August, 1884, and the appellee, W. C. Kendrick, administered on his estate, and in order to a settlement with creditors filed a petition in the Louisville Chancery Court, to which the appellant (Masonic Savings Bank) was made a defendant. The estate of Bangs was not only involved, but utterly insolvent.

The Masonic Savings Bank, being a large creditor of the estate, filed an answer and counterclaim setting forth its various demands, and among them the note for \$10,000. A judgment was asked by the bank for the sale of the stock pledged to secure the payment of that note. The administrator and the bank consented by an agreed order that the bank should sell the stock, subject to the rights of the parties in interest. The stock was sold by the bank, and realized, after the payment of all costs, the sum of \$13,495.10. This sum satisfied the note and left a surplus of \$3,536.45 cents, and the manner in which this surplus is to be distributed is the question on the appeal.

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The bank holding many other large claims against the estate asserts its right to apply this surplus to their payment, insisting that by the law merchant it has a lien over other creditors, and if not, having possession of the fund, its right to a set-off against the claim of the administrator can not be denied.

We find no decision by this court determining the question involved, but the right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books on the subject of banks and banking, and sustained by an unbroken line of American decisions. So when the depositor is indebted to the bank his funds in the bank may be applied to the payment of the debt at its maturity, and a failure of the bank to make such an application has been held to discharge the indorser or sureties.

The right to a set-off would also exist against the administrator or representative of the depositor attempting to recover the deposit after his death. (Moore on Banking, pages 34, 35, 36.)

This doctrine as to the general liens of a bank, or its right to a set-off, does not control the question involved in this case.

It is equally as well settled that where the deposit is made for a special purpose, with the knowledge and undertaking of the bank, that purpose must be carried out; or where the pledge is specific to secure a particular debt, the lien only applies to the debt intended to be secured by it. "A security given for a contemporaneous advance of one thousand pounds by the banker was held not to be applicable against an indebtedness of five hundred pounds afterwards arising on the ordinary running account." (Moore on Banking, page 36.)

In this case the intestate deposited with the bank three hundred shares of the New Galt House stock to secure the payment of the note for \$10,000. The title to the stock was in the intestate subject to this pledge, and the bank had no right to sell more of the stock than would satisfy the debt it was given to secure. If two hundred shares had satisfied the debt the intestate, if living, could have maintained an action against

the bank for the remaining one hundred shares. The debt having been paid, the pledger or owner would have been entitled to the immediate possession of the stock remaining unsold.

The administrator of Bangs consented that the whole of this stock might be sold by the bank, and when sold, the special pledge having been satisfied, the surplus fund arising from the sale passed to the administrator. It was the property of the estate, and its conversion into money did not alter the rights of the parties. If the appellee, as the administrator, had paid off the \$10,000 note the whole of the stock would have belonged to the estate, and no lien could have been asserted against the administrator so as to have prevented a distribution among the general creditors.

The special agreement with reference to the particular debt repels the inference that it was pledged for any and all debts that might thereafter be owing the bank by the intestate. In *Parsons on Contracts*, volume 3, pages 264, 265, the lien of the banker is thus stated: "When a negotiable note is endorsed to a banker by the payee as collateral security for one only of several demands for which he is liable, the banker has no lien on such note as security on any other demand against the endorser."

Kent, in his *Commentaries*, volume 2, page 775, states the rule: "The pawnee will not be allowed to retain the pledge for any other debt than that for which it was made, even though the holder be a banker."

In *Duncan v. Brennan*, 83 New York, 487, it was held that personal property pledged for a particular loan can not, in the absence of a special agreement, be held by the pledgee for any other advance, and in that case it was also said that "the general lien which bankers hold upon bills, notes and other securities deposited with them for a balance due on general account can not exist where the pledge of property is for a specific sum and not a general pledge."

In the case of the Neponset Bank v. Leland, 5 Met., Mass., 259, it was adjudged that "where a negotiable note is endorsed to a bank by the payee as collateral security for only one of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the endorser."

In the case of Wyckoff v. Anthony, &c., 90 New York, 442, the bonds in controversy were pledged by the plaintiff as collateral security for a note of \$8,000. The plaintiff tendered the firm the amount of the debt and interest, and demanded the securities. The defendants refused to deliver them unless the plaintiff would pay another claim of the defendants against the plaintiff for which the bonds had not been specifically pledged. The plaintiff then brought his action for the value of the bonds, alleging their conversion by the defendants. It was held that where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance, or for the payment of other claims, and a recovery was permitted.

We have found no case decided by the courts of this country sustaining the position assumed by counsel for the appellant, and the English cases relied on, particularly the case of Davis v. Bowsher, 5 T. R., 481, decided by Lord Kenyon, states the rule to be "that by the general law of the land a banker has a general lien upon all the securities in his hands belonging to any particular person for his general balance unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule."

This general lien arises from the usage of trade, and the fact that the parties have made the pledge for the particular debt must be held to exclude the intention of creating or relying on a lien that would otherwise exist upon the general deposit account. It is a special deposit or pledge for a special purpose, and when that purpose is accomplished the lien ceases to exist. A general lien in such a case would be inconsistent with the special undertaking. (Grant on Banking.)

Counsel on each side in this case have bestowed much labor in prosecuting and reviewing the authorities on this question, and while some of the English cases would tend to sustain the claim of lien, the whole current of American authority is against such a doctrine.

Nor is the appellant entitled to a set-off either at law or equity against this claim of the administrator. Mutual debts existing between the intestate and the bank might be set-off by the bank either at law or equity, but in this case there was no debt due the intestate. The latter was liable to the bank for a large sum of money, and had pledged his stock in a corporation to pay a part of the debt only. The stock was not converted by the bank into money during the life of the intestate, and no lien, legal or equitable, existed on the part of the bank outside of the pledge. The stock was the property of the intestate, in the possession of the bank, and at his death the title vested in his personal representative. If Bangs had mortgaged his personal property to secure this debt, a satisfaction of the mortgage debt by a sale of a part of the personalty would have left the intestate entitled to the remainder, free of any encumbrance by reason of the mortgage, and the pledge by a delivery of the possession of the stock to the bank only invested it with an equity to the extent of the pledge made. Equitable rights might have arisen as between the intestate, if living, and the bank, entitling the latter to some of the provisional remedies authorized by the Code, but here the personal assets, after satisfying the lien, vested in the administrator, and the specific lien having been removed, the surplus is for distribution between creditors as provided in sections 33 and 34 of chapter 39, General Statutes.

When the personal estate is covered by liens giving a creditor priority, the residue, after satisfying the lien, must be paid to other creditors until they have received a sum equal pro rata with the lien creditor. This statutory provision applies to all liens created on the personal estate, whether by

operation of law or by express contract between the parties. (Spratt v. First National Bank of Richmond, 7 Ky. Law Rep., 791.)

This estate being insolvent, in any event the bank must stand back until the other creditors are made equal to the lien asserted and allowed it by reason of the pledge.

The judgment below conforming to these views must be affirmed.

Helm & Bruce for appellant.

W. O. & J. L. Dodd for appellee.

CITY OF NEWPORT v. NEWPORT LIGHT CO.

DEUBER LIGHT CO. v. SAME.

(Filed May 20, 1886.)

1. Municipal corporations—Contract with gas company—Exclusive privileges—Where a municipal corporation has the power, express or implied, to contract with others to furnish its inhabitants with the means of obtaining gas at their own expense, it has the power to make a contract granting to a corporation the exclusive right to the use of its streets for that purpose for a term of years.

2. It being the duty of a municipal corporation to light its public streets and to furnish its inhabitants with the means of obtaining gas at their own expense, where such a corporation has the power by legislative grant to erect and maintain gas works for that purpose, it necessarily follows that it has the implied power to contract with others to furnish it in like manner, and where there is a contract to that effect there is no reason why it should not be enforced or governed by the same rules applicable to contracts between natural persons.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Pryor.

This litigation is between the appellants, the City of Newport and the Deuber Light Co., on the one side, and the Newport Light Co. on the other. The several actions were originally instituted in the Campbell Chancery Court and transferred to the Louisville Chancery Court, and there heard and determined by the vice chancellor in favor of the Newport Light Co.

The Deuber Light Co. filed its petition, alleging its existence as a corporation created and organized under the provisions of chapter 56 of the General Statutes, and claims to have full power and authority to contract for and supply the inhabitants of the city of Newport with gas for illuminating and other purposes, and to have, hold, own and maintain all pipes, property and fixtures necessary for said purpose, further alleging that as a corporation it had been given full power, authority and right by the mayor and board of councilmen of the city to enter upon the streets, lanes, alleys and public places of the municipality, and upon any and all of its streets, etc., to lay their pipes and all necessary fixtures for supplying the citizens and inhabitants of the said city with gas for illuminating and other purposes, and that plaintiff is now in the full possession of and entitled to the enjoyment of their rights.

That on the third day of June, 1880, the mayor and board of councilmen of the city of Newport passed an ordinance, entitled "An ordinance further providing for the lighting of the city of Newport, Ky.," section 1 of that ordinance providing "that from and after the passage of this ordinance there shall be, and is hereby, granted unto the Newport Light Co. and their successors the exclusive privilege of using any or all of the streets, lanes, commons, alleys and public places of the city for the purpose of laying pipes to convey and supply gas to the city of Newport and others, this privilege for twenty-five years from the date hereof, and until the city shall give the company twelve months' notice to terminate the same, and embraces the right of said company to use said streets, lanes, alleys and public grounds for establishing and conducting said business." It is also alleged that the (defendant) Newport Light Co., under and by virtue of said contract, was claiming and asserting the sole and exclusive right to the use of the streets, alleys, public places, etc., of the city of Newport for the purpose of laying down its pipes and fixtures, that it might supply the city and its inhabitants with gas. That the city of Newport had no right, power or authority to grant to

the Newport Light Co. or to any other corporation such an exclusive right to the use of its streets for the period of twenty-five years, or for any other period of time, and, therefore, said grant is null and void. It is further alleged that the Newport Light Co. was obstructing and preventing the plaintiff from executing its contract; that its stock had not been fully paid, and the defendant by the assertion of this exclusive right was clouding the right and franchise of the plaintiff and preventing it from conducting its business, and delaying the payment of the stock subscription and preventing the making of further subscriptions thereto.

A temporary injunction was granted enjoining and restraining the Newport Light Co. from asserting this exclusive right. The contract with the Deuber Light Co. was made on the 19th day of February, 1885. An answer was filed to this petition by the Newport Light Co. that was made a cross petition against the city of Newport, and the city enjoined, at the instance of the Newport Light Co., from conferring upon the Deuber Light Co. the right or privilege of laying pipes in its streets, alleys, public places, etc., for the purpose of supplying gas to the city or its inhabitants.

On the 19th of February, 1885, the Newport Light Co. also filed its petition, by which an injunction was granted enjoining the city of Newport from entering into the contract with the Deuber Light Co., or from conferring upon that company the right to enter upon its streets for the purpose of laying down its pipes, etc.

In this proceeding the contract between the Newport Light Co. and the city, entered into in the month of June, 1880, is fully set forth, and the further averment that it had entered upon the streets by laying down its pipes, etc., and was then and had been executing its part of the contract and performing all the conditions thereof. By the stipulations of the contract the Newport Light Co. and its successors, from and after the 11th of June, 1882, was given the exclusive privilege of using

the streets, public places, etc., of the city for the purpose of laying pipes to convey and supply gas to the city and others, said privilege to be so enjoyed and used for the term of twenty-five years from June 11, 1882, and until the city should give the company twelve months' notice to terminate the same. The plaintiff was to furnish to the city upon its several streets, lanes and alleys, and public places in which pipes were laid, a continuous supply of gas equal in quality to Cincinnati gas, in such quantities as the defendant might require and direct for the use of the public streets, lamps and public buildings owned by it, at a fixed price for each one thousand cubic feet; that gas should be furnished the inhabitants of the city for their private consumption at rates as follows, viz: "At \$1.90 per thousand cubic feet for the period of five years from June 11, 1882; at \$1.80 cents per thousand cubic feet for the period of five years from June 11, 1887; at \$1.75 per thousand feet for fifteen years from June 11, 1892. All public places, lamps, lamp posts and other requisite fixtures to be furnished by the company and erected at such times places, and in such numbers, where the main pipes are laid, as the city may direct." The contract between the parties contained many other stipulations not necessary to be considered. The city of Newport in its answer to this petition of the Newport Light Co. says: That if there was a valid contract between the city and the Newport Light Co., which it denies, the same was superseded by a contract entered into between the two on the 21st of February, 1884. This subsequent alleged contract was attempted to be made, but never executed by either of the parties, and the principal question presented on the two appeals involves the right of the city of Newport to enter into the contract with the Newport Light Co. by which the latter was given the exclusive right to lay down its pipes in the streets of the city and furnish to the city and its inhabitants illuminating gas for the period of twenty-five years. If that contract is valid the judgment below perpetuating the injunction against the city and enjoining the Deuber Light Co. from laying its pipes in

the streets for the purpose of furnishing gas to the city and its inhabitants was proper, and must be affirmed.

The act incorporating the Newport Light Co. provided that "it might furnish any city, town, district, corporation or locality, or any public institution, manufacturing establishment, or private persons with gas or other lights, for such time and upon such terms as may be agreed upon by the parties." The charter of the city of Newport empowered that municipality "to construct, maintain and operate gas works and to pass all ordinances necessary to regulate the same." (Acts 1873-74, page 337, section 6.)

It is plain from this part of the city's charter that its council had the right not only to construct gas works and enter upon the streets for the purpose of laying down pipes, but it was in effect a general grant of power to have the city lighted with gas, and to contract with the Newport Light Co. or others to furnish it upon such terms as the parties might agree. While grants of power to such corporations are to be strictly construed, the object sought to be accomplished must be considered, and being invested with the right to light its streets with gas or to construct and maintain gas works for that purpose, its right to contract under such a power is unquestioned.

So each of the contracting parties, clothed with legislative authority for the particular purpose, have contracted with reference to this franchise, and the Newport Light Co. had entered upon the streets of the city, and at the institution of these actions was in the undisturbed enjoyment of the franchise under its contract and in the actual discharge of its obligations to the city by reason of its stipulations. It is insisted by counsel for the Deuber Light Co. that while the Newport Light Co. may have been permitted to lay down its pipes in the streets of the city, it has no such exclusive right as will prevent the city from granting the same right to another corporation. If a mere license or permission to use these streets is the only grant made or privilege conferred on the Newport Light Co., it may well be argued that similar privileges may

be granted to others. But the claim of the appellee (the Newport Light Co.) to the exclusive use of the streets is based upon a contract entered into between it and the city of Newport, by which an obligation was created on the part of the company to the city to furnish gas to the public and to the private consumers for the period of twenty-five years, and this obligation was the consideration for the grant of the franchise. If the city could make such a contract for the use of its streets no such question as that of an exclusive privilege can arise. A mere license or use of a public street to a private corporation, although devoted to a public use, does not confer an exclusive privilege; but where it is incumbent on a municipal corporation to furnish light and water for the public use and that of its inhabitants, the right to exercise the power to supply such wants might well be argued as within the range of legitimate municipal legislation.

It may be regarded, however, as well settled that the right to use the streets of a city by a gas company to enable it to lay down its pipes "is a franchise that can be granted only by the legislature or some local or municipal authority authorized to confer it." (Dillon on Municipal Corporations, volume 2, section 691.) "However it may be, as respects the power of the legislature to make the grant exclusive, no such power, it is clear, can be exercised by a municipal council unless it be plainly conferred by express words or by necessary or at least reasonable implication." (Dillon on Corporations, section 695.)

If it is the duty of the municipality to light its public streets and to furnish its inhabitants with the means of obtaining gas at their own expense, and having the power by legislative grant to erect and maintain gas works for that purpose, it necessarily follows that it has the implied power to contract with others to furnish it in like manner, and when there is a valid contract to that effect we perceive no reason why it should not be enforced or governed by the same rules applicable to contracts² between natural persons.

It will not be contended that the city, through its council, can enter into such a contract in discharge of a public duty and then violate its provisions at the will and pleasure of the council, or disregard its obligation when terms more favorable are offered by some other corporation. Nor do we perceive the philosophy of the rule that prevents the municipality from contracting with an individual or a corporation to furnish gas to the city or its inhabitants for a fixed and definite period if the right to contract is derived from the sovereign power.

“A private corporation, as well as individuals, may be employed by a city to aid in the construction of works needed for the health, comfort and convenience of its citizens.” (New Orleans v. Clark, 95 U. S. Supreme Court, 644.)

In the present case the private corporation, known as the Newport Light Co., is invested, in express terms by a provision contained in its charter, with the right “to furnish any city, town, district, corporation or locality, or any public institution, manufacturing establishment or private premises, with gas or other light for such time and on such terms as may be agreed on by the parties.” Under that power it contracted with the appellant, the city of Newport, to furnish it gas for the use of the public and its inhabitants for twenty-five years with the exclusive right to the use of its streets for the purpose of laying down its pipes. It expended largely over \$100,000 to enable it to execute its contract, has violated none of its provisions, and the city is now maintaining that the contract is void as to the exclusive privilege conferred and binding only to the extent that the corporation can furnish gas for such public use as may be required by the city. That the Deuber Light Co. should be allowed to lay down its pipes and furnish to such of its inhabitants as may choose to purchase its gas at a less price, leaving the appellee with this large expenditure, with no other return from the investment than the small sum to be realized from lighting the streets of the city. It is conceded by the Deuber Light Co. that the city of Newport had the right to contract with the Newport Light Co.; but, like the

city of Newport, it insists that the provisions of the contract conferring the exclusive privilege is void. The cases of the State, ex rel., &c. v. Cin. Gas Co., 18 Ohio St., 262, and the Norwich Gas Light Co. v. The Norwich City Gas Co., 25 Conn., 19, and the general doctrine laid down by Dillon on Corporations is relied on to sustain this view of the question.

The question of exclusive privileges, the creation of monopolies and the want of consideration or mutuality in the contracts controlled the decisions in those cases, and we may add the rule of law recognized in those cases and the reasoning upon which they are based, or in the cases following them, has not been sanctioned or approved in the recent decisions of the Supreme Court in cases involving like questions.

In the case of the New Orleans Gas Co. v. Louisiana Light Co., 115 U. S., the Supreme Court, through Mr. Justice Harlan, said: "It is difficult to perceive upon what ground we can deny her authority (the State) when not forbidden by her organic law, in consideration of money to be expended and important services to be rendered for the preservation of the public comfort, the public health or the public safety, to grant a franchise to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies;" and again, "the constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals or the public safety, as the one or the other may be involved in the execution of such contracts." (Pages 665, 672.)

Nor is legislation of this character "liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business open as of common right to all, upon terms of equality, for the right to dig up the streets and public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be

granted by the State or by the municipal government of that city acting under legislative authority." (Page 659, *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., —; *Louisville Gas Co. v. Citizens Gas Co.*, Id., 688; *New Orleans Water Works v. Rivers*, 115 U. S., Id., 674.) The province of the legislature, or the city of Newport under legislative authority, to grant an exclusive privilege is not, therefore, involved in this case. It is purely a question of contract, and if the city of Newport had the right to contract with the appellee to furnish gas to the city and to such of its inhabitants as might desire to use it, the contract should be enforced, and neither the city nor any individual or corporation can interfere with its rights under it. Exclusive privileges can only be granted in consideration of public services, but this provision of the bill of rights has no application to this class of contracts, nor does the exercise of the public power for the protection of the public health or public morals affect the questions involved. The contract for the supply of gas in this case must necessarily be exclusive. Each party had the right to contract, and by its stipulations the appellee is bound to furnish gas to all buildings along the lines of these main pipes when compensation is made, or offered to be made, as required by the contract. The city has exhausted its power and done that which under legislative authority it had the right to do, and, besides, contracted with the appellee that, by the terms of its charter, had been invested with the special privilege of entering into such contracts. Nor do we perceive how a contract could well be made without any limit as to time or restriction in some way upon the rights of the parties making it. The contract with appellee may have been injurious to the best interests of the city, but, however that may be, having been entered into by the properly constituted authorities upon a consideration that they deemed adequate and proper; there is no reason for disregarding its provision.

The chancellor is powerless to relieve the municipality of the consequences resulting from an improvident contract where its council had the power to execute it. In order to the discharge

of a public duty, that consisted not only in lighting its streets and public places, but in placing gas within the reach of its inhabitants, the city has been given the right to the use of the streets for that purpose. The private citizen had no right to the exercise of the franchise, and while the mere privilege of laying down pipes in the streets or rails upon the surface for street railways for private gain, and without any obligation on the part of the company undertaking it that can be enforced, can not be made exclusive. When parties have contracted, by the direction of the sovereign power, to discharge a public duty that is not only necessary but indispensable to both public and private interests, the contract is as sacred as if made between individuals competent to contract in matters affecting the right of private property, and must be controlled by the same general principles applicable to all contracts. We must interpret this class of contracts and the legislation under which they are made (as in all other cases of contracts) in the light of reason, and with a view of carrying into effect the legislative intent. The exercise of the franchise was necessary to accomplish the object in view. It was indispensable to enable the appellee to comply with its terms, and no individual or corporation would have invested such a large sum of money as it is conceded was requisite for a compliance with the demands of the municipality with the privilege on the part of the council to abandon its terms, in part at least, because other contracting parties were offering terms less expensive to the city or its inhabitants. An expenditure of over \$100,000 in 1882 that it could be deprived of, or the profits at least, in 1885.

The contract with a corporation is as inviolable, when the right to contract exists, as with natural persons. The city council of Newport, looking to the comfort and convenience of its population and the public welfare, has contracted with the appellee to furnish gas for a fixed period. There is no pretense that any of its provisions have been violated by the appellee or that it has any of the elements of fraud or mistake vital to

any contract, and, therefore, the law should recognize its validity and enforce its obligation.

The right of the appellee to seek protection from the chancellor to preserve the franchise is now a familiar rule of equity jurisprudence. (Jersey City Gas Co. v. Dwight, 29 New Jersey, 242.)

With this view of the questions presented, it becomes unnecessary to determine the power of the Deuber Light Co. to enter into such contracts.

In our opinion the judgment of the vice chancellor was proper, and is, therefore, affirmed.

Wm. Lindsay, James C. Wright, C. J. Helm, E. W. Hawkins, R. B. Hawkins and Hallam & Myers for appellant.

Carlisle & Carlisle and Nelson & Washington for appellees.

SPENCER COURT OF CLAIMS v. POIGNARD, &c.

(Filed April 8, 1886.)

1. County court—Alteration of roads—Mandamus—Special judge—An application may be made to the county judge alone for the opening or alteration of a public road, and although the damages be assessed by a jury, or fixed by agreement, at a sum exceeding \$50, the court of claims has no discretion, but is obliged to levy a tax to pay the damages and costs, and may be compelled by mandamus so to do. The statute which prohibits the county court, unless composed of a majority of the justices, from making an appropriation or charge on the county of any sum exceeding \$50 for any one object does not apply to such cases.

2. The county judge declining to act, the statute authorizes the nearest justice to take the bench, and the justice having heard the case without objection, it is not necessary to determine whether or not the reasons of the regular judge for declining to act were sufficient.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Pryor.

A mandamus was awarded by the Spencer Circuit Court against the Spencer County Court of Claims, compelling the last-named court to levy a tax to pay the damages and costs incurred by reason of the alteration of a certain public road in

that county. The proceedings for the alteration of the road were had under the provisions of chapter 94, General Statutes, and the mandamus was obtained at the instance of the land owners who had been allowed damages under an agreement with the county judge.

The court of claims refused to make a levy to pay the damages on the ground that the county judge had no power to compensate the owners or to remand the case to a jury that damages might be assessed if the amount to be paid exceeded \$50; or, if so, the same was subject to their approval, and declining to approve the action of the county judge, directed the attorney for the county to prosecute an appeal. No appeal was prosecuted, and hence the mandamus.

It is claimed by counsel for the county that section 1 of article 3 of chapter 27, General Statutes, prohibiting the county courts of the State (except Jefferson county), unless composed of a majority of justices, from making any appropriation or charge on the county, to be paid out of the county revenue or levy, of any sum exceeding \$50 for any one object, applies to cases of this character, and, therefore, the court of claims, in their discretion, could either reject or approve the action of the county judge, and this is the question involved on the appeal.

Section 1 of article 17, chapter 28, General Statutes, provides "that the county judge in each county shall hold the county court on the day prescribed by law, but at the court of claims, which shall be held once in each year, the justices of the peace of the county shall be associated with him and constitute the court, * * * which shall be confined to laying the county levy, appropriating money and transacting other financial business of the county."

It, therefore, follows that an application may be made to the county judge alone for the opening or alteration of a public road, and his judgment, when holding the county court with reference to such matters, is final and conclusive until vacated or reversed. The county judge may summon the justices to

attend any term of the county court, and could have summoned them in this case, but the question presented in this case is, was he required to summon them when in his opinion it became necessary to condemn the land of these appellees for the public use, or to consult their judgment when a jury had assessed the damages at a sum exceeding \$50, or when the owners of the land were willing to accept a reasonable compensation without the intervention of a jury? The statute with reference to roads contains no provision authorizing the court of claims to pass either on the necessity for the road or the quantum of damages to which the owners of the land may be entitled, but, on the contrary, provides in express terms that "if the court has enough before it to enable it to fix on a just compensation to the owners whose lands have been taken," and they are willing to accept it, the writ of *ad quod damnum* may be dispensed with; but if the owners desire it a jury must be empaneled. (Sections 6 and 8 of chapter 94, General Statutes.)

Section 16 of the same statute provides that "when a road is opened or is altered the county court shall levy the amount of damages at its next court of claims as well as the legal costs, etc.," evincing clearly an intention to vest in the county court, held by the county judge at its regular term, the jurisdiction to establish and alter roads and to fix the compensation if a jury is waived by those entitled to damages, and when this is done, making it imperative on the court of claims to make a levy to satisfy the damages awarded. This proceeding in regard to roads under chapter 94 is so specific and definite in its character that it is unreasonable to adjudge that the law making power intended, regardless of these express enactments conferring jurisdiction on the county court as distinguished from the court of claims, to give to the latter court, composed of a majority of the justices, the power to annul the entire action of the county judge in establishing a road by refusing to make a levy to compensate the owners. The case heard, the road established, and the damages assessed by a jury or the

court, and still a subsequent court of claims retaining complete revising power over the question of payment, such was not the legislative intent and is not a proper construction of the statute. The case referred to by counsel of Harrison County v. Smith, 15 Ben Monroe, 155, has no analogy to the case being considered. The county judge has no power to cause new buildings to be erected or old ones to be repaired when the expenditure exceeds \$50, because expressly prohibited by the statute; while, on the other hand, the power to fix the compensation in the case of a road is expressly conferred. In this case the surveyor was ordered to open the road immediately, or as soon as practicable after the sums allowed the owners of the land were paid or tendered them, and for that reason it is argued that the road was established on condition that the levy would be made by the court of claims. It necessarily followed that no entry could be made on the land of the owner until he was paid or the compensation tendered, and this order only followed the law, but imposed no condition whatever vesting the court of claims with any discretion over the subject-matter.

The county judge had no power to refuse to alter or establish the road except on legal grounds. The testimony, including the report of the viewers and the damages ascertained, was all before the court, and his judgment on the issue being purely judicial he could only deny the application in the event the facts authorized it. If the county judge on the return of the inquest, if one had been held, had arbitrarily decided that he would not open or alter the road, the applicants had the right to appeal to the circuit court, and from that court to a still higher court. The proceeding is in effect an issue of fact as between the applicant on the one side and the contestants on the other, the court determining the necessity for a public road at the place designated from all the evidence adduced. This action of the county judge holding the county court can be revised by the circuit court at the instance of any party aggrieved, and the judgment of the circuit court revised by this court, and although these various judicial tribunals have

passed upon the rights of the parties, including the question of damages, it is still insisted that these are only initiatory steps towards the establishment of the road, and that the court of claims has the discretionary power to make or refuse the levy, and thus defeat the application under which the road has been established and the damages assessed. The court of claims has no such discretion, and if the county is aggrieved the remedy is by an appeal. Without inquiring into the reasons influencing the legislature in providing the mode found in the statute for establishing or altering roads, it is sufficient to say that such is the plain letter of the statute, and this construction given its provisions, or statutes similar in their character, has been followed since we have had a law on the subject embracing both the Revised and General Statutes. It is insisted that the special judge trying the case was not sworn, and, besides, was without authority to hear the application. It appears that one of the parties to the proceeding objected to the regular county judge, and the judge presiding, being the nearest justice, took the bench. This is expressly authorized by statute. He heard the case without objection, and whether the reasons for the regular judge declining to act or causing him to leave the bench were or not sufficient, is not necessary to be determined. His judgment was not void on either ground relied on, and the judgment below is, therefore, affirmed.

A. P. Harcourt and Wm. Lindsay for appellant.

G. G. Gilbert and Rozel Weissinger for appellees.

BANK OF KENTUCKY v. ALLEN.

FARMERS BANK v. SAME.

(Filed May 11, 1886.)

1. Final order—A judgment that determines the right, but does not give the relief, is not final.

In an action to enforce different liens upon the same tract of land a decree directing the sale of the land to pay, first, the debt of A; second, the debt of B; third, the debt of C; and, fourth, the costs of the case, does not settle finally the priority of liens, particularly when no issue is made as to

priority; and when the sale is made the court may in the distribution of the proceeds disregard that judgment in so far as it attempts to determine the question of priority.

2. Vendor's lien—Assignment of notes—Where several purchase money notes executed for the same tract of land are assigned by the obligee at different times to different persons, no one of the assignees acquires a preference over the other unless by special contract.

3. Right of assignor—While the assignor of purchase money notes is liable on his assignment for the solvency of the obligor, yet when that liability terminates by reason of the want of diligence on the part of the assignee, the assignor, if he still holds some of the purchase money notes, will share pro rata with the assigned notes where the land fails to pay the whole of the purchase money.

4. Fraudulent assignment—Rights of attacking creditor—Where a creditor of the assignor of purchase money notes assigned to different persons attacked the assignment of some of the notes as fraudulent, and asked that the land be subjected to the payment of the notes fraudulently assigned, and the proceeds applied to the payment of his debt against the assignor, the fraud being established, the attacking creditor became entitled to all the rights of the assignor, and in the distribution of the proceeds of sale to satisfy the several liens is entitled to his pro rata share, the assignor having been released from liability on the valid assignments by the want of diligence on the part of the assignees.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Pryor.

This case, from its inception to the present hearing, has involved many perplexing questions, some of which have been settled on former appeals and others remain to be disposed of on this appeal. The question of priority between the creditors of Joseph Cantrill is now made, and the opinion rendered at this term not being satisfactory to counsel on either side, it becomes necessary to extend it, with a view of determining finally the right of these parties.

Joseph Cantrill purchased of the appellant (the Bank of Kentucky) a tract of land in the county of Scott, known as the Dudley Davis farm, paying a part of the purchase money in hand and executing his notes for the balance, to secure the payment of which a lien was retained in the deed.

Cantrill, after his purchase, sold the land to Duckworth and took from the latter in part payment his six notes for the purchase money, and to secure the payment also retained a lien. Cantrill assigned three of the notes on Duckworth to Kennedy—

one to Everett Allen, one to Kate Allen and Shawhan jointly, and another to Kate Allen, making six in all.

The Bank of Kentucky filed its petition, asserting its lien for the purchase money due by Cantrill on his purchase, and holding other claims against Cantrill unsecured, but upon which judgments had been obtained, with a return of nulla bona, assailed by proper pleadings the transfer of the notes on Duckworth to these various assignees, Kate Allen and others, as fraudulent; obtained an attachment and had it levied on the land that Duckworth had purchased. The transfers of the Duckworth notes were asked to be disregarded, and the land sold for the purchase money due by Duckworth to pay its debts not secured, as well as the lien note it held on Cantrill. The Farmers Bank having a claim, filed the same character of petition attacking the transfers and asking a judgment.

The parties who held the notes on Duckworth by assignment from Cantrill made no question as to the rights of each to the notes held by them respectively, nor any question as to the priority in lien. The banks alone were claiming that the transfers were fraudulent.

After a tedious litigation the court below held that the transfers to Kennedy and Kate Allen were fraudulent, and that as to Shawhan there was no proof as to the validity of his claim. As to Everett Allen it was held that the assignment to him was valid. So, by the judgment below, the transfer of all the notes on Duckworth was held to be invalid except the transfer to Everett Allen—that was held to be bona fide.

Kennedy, Kate Allen, Shawhan, etc., prayed an appeal from the judgment deciding that the transfers were invalid, and that they had no interest in the notes. Everett Allen prayed an appeal because his claim had been reduced by allowing an improper credit. No question was raised either in this court or the court below as to priority, and it is insisted that no priority was adjudged so as to make it final between the parties in the distribution.

The judgment heretofore appealed from, and by which it is claimed that Everett Allen has priority over the bank, after determining the transfers to be invalid and directing the sale of other land not involved in the consideration of this question, then proceeds "to direct the commissioner to sell the Dudley Davis farm, or so much thereof as may be necessary to pay the following sums:

"First, to the plaintiff (the Bank of Kentucky) the sum of \$4,425, with interest, after certain credits were given, etc.; second, to John F. Cantrill the sum of \$2,800, with interest; third, to Everett Allen \$6,000, with interest, subject to certain credits, etc.; to the plaintiff (the bank) \$2,000, etc.; to the Farmers Bank \$864, etc.; fifth, the costs and expenses of making sale, including allowance to commissioner; sixth, the sum left to be for the benefit of the assignees of Cantrill, Kate Allen and others," etc.

The decree or judgment then proceeds to direct the commissioner as to the manner of sale, and concludes: All other questions are reserved and an appeal granted to Ellen Allen, Elisha Kennedy, Everett Allen, Kate Allen, Henry Shawhan, etc.

On the appeal from this judgment a credit allowed on Everett Allen's note was held improper, and the judgment in that regard reversed. As to Kate Allen and Kennedy the judgment was affirmed. As to Shawhan the judgment was reversed, and he held entitled to that part of the note assigned him for indemnity as the surety of Cantrill. The original lien notes due the bank and John Cantrill by Joseph Cantrill for the land constituted a lien on the land, and that fact is not controverted. But the judgment of the court below having been affirmed by this court, holding that the transfer to Kennedy and Kate Allen was fraudulent, and reversed as to Shawhan, when the case went back for the purposes of distribution, Everett Allen and Shawhan maintained that the judgment appealed from determined the question of priority, giving the right to the Bank of Kentucky and John Cantrill to be first satisfied for the original purchase money due by Joseph Cantrill, and

then to satisfy the note to Everett Allen and the reversal as to Shawhan, necessarily placing the latter on an equality with him, the Duckworth notes held by them were first to be paid, and then the notes, the assignment of which had been held fraudulent, were to be applied to the payment of the unsecured debts due the bank. The court below so held, and that is the present subject of controversy between these parties.

The first question presented is, was there a judgment determining the priority of liens, and, if so, was that judgment final? In the first place it can not be said from the pleadings, at least, that any claim was made to the effect that any one of the lien notes had preference over another, nor could such a position have been maintained under the well-recognized rule of this court applicable to such cases. Each note being a lien on the land, carried with it its proportion of the proceeds of the sale. They share equally pro rata. (*Burns v. Roulhac's Adm'r*, 2 Bush, 39; *Broadwell v. King*, 3 B. M., 449; *Logan v. Anderson*, 18 B. M., 114.)

The only issue then made between the banks and the defendants was as to the validity of the assignments and the erroneous credit allowed on the note to Everett Allen, and the court below having disposed of those issues, ordered a sale of the land to satisfy the debts, enumerating the various claims as 1, 2, 3, 4, 5 and 6, and perhaps intending to make a distribution of the proceeds of the sale ordered under the idea that the banks acquired no lien equal in dignity by their proceeding in equity upon a return of nulla bona to the lien of Everett Allen. As to Shawhan the chancellor had decided against him and in favor of the banks, and as on his appeal the judgment was reversed, on the return of the case the banks for the first time could have raised the question as to their right to a lien equal to that of Shawhan. If by their petition in equity, on a return of no property, they sought to cancel the transfers to Kate Allen and Kennedy and succeeded, thereby acquiring a lien for the amount of the notes of which Kate Allen and Kennedy had been deprived, they lost no right as

against Shawhan for the reason that in the court below they succeeded against him, and not until the return of the case from the judgment in which this appeal is prosecuted did the banks have an opportunity to insist that Shawhan had no lien superior to their claim. But it is argued that Everett Allen was adjudged priority, and that no appeal was prosecuted from that part of the judgment by the banks or the holders of the other notes. There was no distribution of the proceeds of sale, or any order made by the judgment requiring or ordering a distribution when the sale was made, but simply a judgment directing a sale to pay certain debts. All other questions were reserved by the judgment in express terms, and there was no other question to be determined but that of distribution. That judgment merely enumerated the claims, as is evidenced by placing the costs and expenses after the claims of all the parties. Technically construed, the claims of creditors are to be paid before the costs. In the case of *Hanson v. Bowyer*, 4 Met., 108, it was held that a judgment giving priority to one creditor over another as to attached funds, when no distribution was made or other relief given, was not a final order.

The rule in *Bondurant v. Apperson* is to the effect that a judgment is not final that can not be enforced to the extent of giving the final relief contemplated by it without further action by the court. (4 Met., 30.) The court decided only the validity of the assignments, and the amount of each claim giving the credits, and to this extent the rights of the parties were affected, but as to the priority of liens the direction to sell to pay the following debts: First, the debt of A; second, the debt of B; and, third, the debt of C; and, fourth, the costs of the case, particularly when no issue is made, does not settle finally the priority of liens, but when the sale is made and the proceeds directed to be distributed the chancellor may disregard such a judgment or order, and distribute the funds as the rights of the parties demand. A judgment that determines the right, but does not give the relief, is not final.

It is, however, argued that if the judgment was not final the bank acquired no right to the lien notes held by Kate Allen and Kennedy because the transfer being fraudulent the notes in contemplation of law belonged to Cantrill, and that Cantrill had no right as against Shawhan and Everett Allen to assert a lien equal to that acquired by them by reason of the assignment from Cantrill.

Cantrill, as the assignor of the notes, would have been liable to Everett Allen and Shawhan if due diligence had been exercised by them in the prosecution of the claims.

The notes were executed by Duckworth, and the liability of Cantrill as endorser having long since ended, he had the same right to enforce his lien that Everett Allen and Shawhan had. They were executed for the same land, and the mere endorsement, upon which no liability existed when these suits were instituted, creates no equity in their behalf as against Cantrill, and, therefore, when the banks, as creditors of Cantrill, attacked the transfers to Kate Allen and Kennedy, and asked that the land be subjected to the payment of the notes fraudulently assigned, they become entitled to all the rights of Cantrill, and in the distribution of the proceeds of sale to satisfy the several liens, the sum being insufficient to satisfy the whole, are entitled to their pro rata share.

In *McClanahan, &c. v. Chambers*, 1 Mon., 48, it was adjudged that "the proceeds of estates conveyed in trust to secure the payment of several notes, some of which are afterwards assigned, are to be divided between the parties in proportion to the amounts of the notes."

In *Broadwell v. King*, 3 B. M., —, it was said: "The whole consideration and amount of each of the notes given operated as a lien on the land, and each was equally secured by it. The assignment of the note by Condor to King carried with it its ratable share of the lien as well as the personal responsibility of the payor. The pursuit of both of these remedies with due diligence would perhaps alone entitle the assignee to recourse upon the assignor, but certainly if either could be dispensed

with the latter could not. If they have not been taken, or at least the latter, the equity of the assignor to his ratable share of the lien to secure the note in his hands, if even it had remained there, could not be affected, though he had, as in this case, removed from the State before the assignment of the second note," etc.

The obligee in purchase money notes may assign them at different times, and yet the liens are equal to the extent of the amount of each note assigned, no one of the assignees acquiring a preference over the other unless by special contract. The assignor is liable on his assignment for the solvency of the obligor, but when that liability terminates, by reason of the want of diligence on the part of the assignee, the original assignor, if he still retains the possession of some of the purchase-money notes, will share pro rata with the assigned notes when the land fails to pay the whole of the purchase money. In this view of the case, therefore, the chancellor, after satisfying the original liens under the purchase by Cantrill, should apply the proceeds of the sale of the land under the Duckworth notes by giving to each lien note its proportion of the purchase money, the banks being entitled to that portion to which Kate Allen and Kennedy would have been entitled had their assignments been made in good faith. This is equitable as between the parties. Neither Everett Allen nor Shawhan denied the right of Kate Allen and Kennedy to the notes assigned them. The banks alone insisted that the transfer was fraudulent, and sought to subject what had been assigned to them to the payment of their debt, and this having been done we see no reason why they should not be entitled to their proportion of the proceeds of the purchase money.

In estimating the amount of their claim only 6 per cent., as heretofore adjudged, should be allowed them on their claim against the land. They may have judgment above the 6 per cent. against Joseph Cantrill, but not to be enforced as a lien by reason of the *lis pendens* to cancel the assignments.

Judgment reversed and remanded for proceedings consistent with this opinion. They are entitled to the interest above 6 per cent. by reason of the conventional interest law in force when the notes were executed.

A. Duvall and D. W. Lindsey for appellants.

J. Q. Ward for appellee.

KENTUCKY SUPERIOR COURT.

C., O. & S. W. R. R. Co. v. WEBB.

(Filed June 2, 1886.)

Common carriers—Measure of damages—Where goods are intrusted to a carrier and are not delivered according to the contract, the value of the goods at the place of delivery at the time they should have been delivered, with interest, is the measure of damages, and where the thing lost is worn and has no market value, as personal apparel, its actual value is what it is worth in its worn condition, as compared with its value if it were new, excluding considerations of inconvenience resulting from being deprived of its use. It was, therefore, error in this case to instruct the jury that they should find for plaintiff what the goods were worth to him "under the surroundings and circumstances," the things lost being wearing apparel and bedding.

Appeal from Caldwell Circuit Court.

Opinion of the court by Judge Bowden.

The appellant received a box at Princeton to be carried to Nortonville, but the box was lost, and this action was to recover damages. The contents, unknown to the company, consisted of bedding, bed furniture, wearing apparel, table furniture, and other articles. The plaintiff alleged the aggregate value to be \$206.85; the company denied it exceeded one-eighth of that sum; the jury found it to be \$180. On the part of the plaintiff there was no evidence fixing the value of any article in the box at the date of the shipment or about that time. There were two feather beds which had been in use fifty years, the feathers consisting of those originally put in, mixed with others put in at different times since, the weight being unknown; there was a coat six or seven years old, costing \$10

when new; the tableware was old; the clock had been used about half a century; the quilts, bolsters and pillows were old; everything was old. There was no evidence as to the condition of any article, except such as could be inferred from the fact that it had been used a long time. In the bill of particulars the two feather beds were valued at \$66, being 60 cents a pound. The only evidence relating to that matter was that introduced by the defendant, whose witnesses said such mixed feathers were not worth exceeding 20 cents, according to which the value would not have exceeded \$22, falling \$44 short of the value alleged. The clock was alleged to be worth \$40. The only evidence relating to its value put it at \$1.50. The dress coat, which was six or seven years old, was alleged to be worth \$10, its original cost. The jury found \$180 damages, or within \$26.85 of the alleged value of the lost articles; while the evidence showed that on the beds, clock and coat there was an over value greatly exceeding \$26.85. It seems quite certain that the jury awarded and intended to award more than the value of the things lost.

And this the instruction of the court permitted them to do. They were told to "find for the plaintiff the value of the goods lost, and the damages incident thereto; and this will include necessary expenses and time in attempting their recovery. In estimating the value of the goods lost they are not limited to their actual value, that is, what such goods could be bought or sold for; but will find what the goods were worth to plaintiff under the surroundings and circumstances."

For the purpose of proving damages "incident" to the loss the plaintiff's attorney asked him "whether or not he and his wife had suffered very much during the past winter for want of the bedding lost, and whether he had not been thereby greatly damaged?" And over the defendant's objection he was permitted to answer: "He and his wife had suffered greatly on account of the loss of the things in the box, and he had been thereby damaged, he thought, in the sum of \$10,000," which was the amount claimed in his petition. It may be re-

marked that though the plaintiff testified that he left Princeton in November, and went back there Christmas, partly to look after the box, partly to look after his lot and cabin, and partly to see his friends, there was no evidence that he had encountered any expense or had spent any time in attempting the recovery of his box. But in view of the evidence objected to and the instruction given it is obvious that the verdict was not for too great an amount, and that it was not contrary to law, assuming (as must always be assumed when the verdict is criticised) that the instruction gave the law correctly.

To what "surroundings and circumstances" the jury were to look, in order to determine what the goods were worth to the plaintiff, does not very definitely appear. He was about seventy years old; after moving from Princeton to Bowling Green, to which place the goods were to be shipped, he, his wife and granddaughter lived with his son; whether he had or did not have money to replace the lost articles necessary to comfort does not appear; the fact that he was old, and that he suffered by reason of not having the bedding, are the only "surroundings and circumstances" disclosed by the evidence. These things determined the verdict; the bedding thus became capable of any value which the jury might put on it, as a famishing man would prize a drink of water more than he would the costly Kohinoor.

When goods are intrusted to a carrier, and they are not delivered according to the contract, the value of the goods at the place of delivery, at the time they should have been delivered, with interest, is the measure of damages. (Sedg. Dam., 356.) With regard to everything having a market value, that is a complete indemnity, since the goods can be replaced with the money thus received; the actual value is thus accurately ascertained by knowing the market rate at which such things can be purchased. But there are things the actual value of which can not be thus ascertained. Personal apparel has no market value; and even if it had, one should not be required to go into such market to replace his lost clothing. The actual

value of the thing lost, and, therefore, the actual damage occasioned by the loss, is the value of the garment, in its worn condition, as compared with its value if it were new, excluding considerations of inconvenience resulting from being deprived of its use. A garment may be sufficiently worn to prevent its having any market value, and yet it may be, for actual use, very nearly as valuable as when it was new and had a market value. There should be a recovery for that part of the original value which has not been consumed by use, but not for that part which has been so consumed.

The difference between the cases is really not in the measure of damages, which is the actual value of the articles, but in the mode of ascertaining what that value is.

The judgment is reversed and the case is remanded, with directions to grant the appellant a new trial.

P. H. Darby for appellant.

J. T. Beauchamp for appellee.

PUSEY v. COMMONWEALTH.

HANMOND v. SAME.

RAPP v. SAME.

(Filed June 2, 1886.)

Repeal of statutes—Punishment for offenses already committed—Under our statute the repeal of a law imposing a penalty for its violation does not take from the courts the power to punish for offenses already committed under it. Rules of construction, whether established by the common law or by statute, apply to and are a part of all laws. Therefore, section 23 of chapter 21 of the General Statutes, which provides that "no new law shall be construed to repeal a former law as to any offense committed against the former law," must be considered as a part of every law repealing a former law which imposed a penalty.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Ward.

The defendant in each of these cases was indicted and convicted for the offense prescribed by section 6 of article 1 of chapter 47 of the General Statutes.

There was a demurrer to the indictment in each case, but for the reasons stated in the case of *Waddell v. Commonwealth*, this day decided, and because these indictments are sufficient to cure the defect pointed out in the indictment in that case, we are of the opinion that these indictments are sufficient.

The only other ground insisted upon for a reversal of these cases is this: The section of the act under which the conviction was had has been repealed by an act approved March 25, 1886.

By the provisions of the last act the offense denounced by the section *supra* is made a felony instead of a misdemeanor. It is insisted that as the law has been repealed there can be no conviction; that the repeal of a law which denounces or forbids an act and declares a penalty for its violation takes away from the court the power to punish, as there is no law to be executed or vindicated when the judgment is pronounced.

This proposition is true unless there is a law saving or continuing in force the old law as to offenses committed before its repeal, and whether we have such a law or not is the proposition to be considered and decided.

It is not contended that we had such a law prior to the adoption of the Revised Statutes, and it is, therefore, unnecessary to consider decisions on the main proposition rendered prior to that time, because it is clear that, in the absence of such an act as the one to be hereinafter considered, the contention made by appellants would be correct.

Section 21 of chapter 21, both in the Revised and General Statutes, provided as follows:

“No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect, save only that the proceedings thereafter had

shall conform, so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

As to whether the rule of construction herein provided for is to be applied to the repealing effect of the law of March 25, 1886, is the question to be considered, and as bearing on this proposition we have been referred to a number of cases decided since the enactment of the Revised Statutes, which we will now consider:

In *Commonwealth v. Palmer*, 2 Bush, 570, Palmer was indicted for enticing slaves away from their owners under section 1 of article 5, chapter 93 of the Revised Statutes. Before he was tried slavery had been abolished by constitutional amendment, and before his appeal was heard the legislature of Kentucky, in order to conform the laws of this State to the new order of things, by the provision of an act approved February 15, 1866, Myers' Supplement, page 737, repealed a number of laws on the subject of slaves and slave property, and among others the act under which Palmer was indicted.

The court, in the argument of the case, recognized the general rule that "a violation of a criminal law will not justify a judgment of conviction if the law shall have expired or been repealed before judgment, because in such a case there is no ground for the conviction to stand on—none to authorize punishment."

But yet the court did not affirm the judgment dismissing the indictment against Palmer, but waived the question as to the effect of the repeal of the law, and as to that said: "It will depend on the legislative intent as to its operation on crimes committed before the repeal, and the interpretation of the repealing act is not involved in the only question now before us—did the circuit court err in dismissing the indictment?"

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So in that case the court did not consider the section under consideration or the effect of the repealing act, but it did decide that the intention of the legislature in repealing the act would affect the question as to whether offenses committed under the old law could still be punished.

In Commonwealth v. Cain, 14 Bush, 525, it was held that the law under which Cain had been indicted had expired nearly ten years before he was indicted. It was not a question as to the effect of the repeal of a law, but of its expiration by virtue of limitation. Of course the section under consideration had no application to the expiration of a law, and it was neither referred to nor considered.

In Speckert v. City of Louisville, 78 Ky., 287, Speckert was indicted for violating an ordinance of the city of Louisville, and before he was convicted the ordinance was repealed. There is nothing to show that the rules of construction to be applied to State laws are to be applied to ordinances of the city of Louisville, or that the legislature has undertaken in any way to say what shall be the meaning, scope, effect or extent of a city ordinance, except that it shall not be contrary to the laws of the State. Its ordinances are to be construed according to the general rules of construction in the absence of rules adopted by an ordinance of the city; hence the section under consideration was not referred to or considered in this case. It was not cited or referred to by counsel.

The decisions of the Court of Appeals and this court upon the forfeiture provided for by the conventional interest law have been relied upon. But that did not inflict a penalty which could be collected, it simply deprived a party of the power to collect any interest on loaned money, hence the interest law was repealed he might collect the interest which the law implied the borrower should pay.

But it is insisted that the section only applies in construing the repealing clause of the statute, and as the repealing clause of the act of March, 1886, provides that "all acts and parts of acts in conflict with this act are hereby repealed," there is

nothing for construction; that the language is clear and unmistakable.

But rules of construction, whether the rules established by the common law or by statute, apply to and are a part of all laws. They are known to the legislature, and it must be understood to have passed a law with knowledge of and regard to the rules of construction, as much so as if the rules had been made a part of the body of each act, and the question is not whether the law is to be construed, but what is its meaning considering the rule of construction as a part and parcel of it, the two go together, they are one body or system of laws, and the courts have no more right to disregard established rules of construction than they have any other law.

We think the section under consideration is to be considered as if it was a part of the act, and, being so considered, there can be as little doubt about the meaning of the act of March, 1886, as to offenses committed under the old law as there would have been if the new law had provided in express terms "that there could be no further prosecutions for offenses committed under the laws hereby repealed."

We feel fortified in this construction by the further consideration that in the only cases in which we find that the effect of section 23 of chapter 21 has ever been directly considered and passed upon this construction has been given to it. (*Acree & Kinman v. Commonwealth*, 13 Bush, 353; *Commonwealth v. Reynolds*, 6 Ky. Law Rep., 520.)

It results that the act of March 25, 1886, did not repeal the law under which the appellants were convicted as to the offenses with which they are charged, and that the judgments are correct, and must be, and are now, affirmed, with damages.

Kohn & Barker for appellants.

A. G. Caruth, B. W. Duke and P. W. Hardin for appellees.

COURT OF APPEALS ABSTRACTS.

CODY v. RIDER.

Filed June 3, 1886. Appeal from Hardin Circuit Court. Opinion of the court by Judge Pryor, affirming.

Passways—Eminent domain—While a passway can not be established for private use because it is more convenient than one already used by the applicant, yet when it becomes necessary to enable him to attend the courts and elections, and to discharge other duties required of him by the law of the land, that he should have a passway over the land of his neighbor, the right of eminent domain may be invoked for that purpose.

J. P. Hobson and R. L. Stith for appellant.

Montgomery & Posten for appellee.

HOWARD v. CORNETT.

Filed June 3, 1886. Appeal from Harlan Circuit Court. Opinion of the court by Judge Pryor, reversing.

Common schools—Election of county superintendent—A county school commissioner, in office at the time of the passage of the act of May 12, 1884, creating the office of county superintendent, holds his office until a county superintendent is elected and qualified under that act. Therefore, although appellee received a majority of the votes cast at the first election held for county superintendent in his county, yet not being permitted to qualify because he had no certificate from the circuit judge, as required, the appellant, his opponent, who was school commissioner at the time of the passage of the act of May 12, 1884, is the superintendent, and will hold until one is elected and qualified.

Hargis & Eastin for appellant.

C. W. Lester for appellee.

HATCHER, &c. v. RAY, &c.

Filed June 3, 1886. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Holt, reversing.

Conveyances among heirs—Husband and wife—The owner of three tracts of land died, leaving nine children, of whom appellant was one. One of the tracts was conveyed to one of the heirs at an agreed price, and another to another, all of the heirs uniting in each deed, and each deed reciting the payment in hand of so much of the price as was equal to the share of the grantee in the price of the three tracts. The third tract was conveyed to the husband of appellant, who united as a grantor in the deed, which recites that \$488 of the \$2,000, the recited consideration, is "in hand paid," this, as recited in the deed, being the interest of appellant in the three tracts, the remainder of the recited consideration to be paid to the other heirs. After the sale to her husband appellant united with him in a con-

veyance of part of the land. Held—That it is clear that, by agreement with all the heirs, appellant's interest in all three of the tracts was transferred to the tract purchased by her husband, and she has never legally parted with that interest, except in so much of the land as she united with her husband in conveying, although she united as a grantor in the deed to her husband. Therefore, she is entitled to 488-2,000 of so much of the land conveyed to her husband as she did not unite with him in conveying, and the other heirs can then enforce their lien for purchase money upon the remainder of the tract.

Edwards & Hazlip for appellants.

L. J. Proctor for appellees.

KIMMELL v. CARUTHERS.

Filed June 5, 1886. Appeal from Ballard Circuit Court. Opinion of the court by Judge Holt, affirming.

Married women—Mortgage—Where husband and wife united in a mortgage of the wife's land the statement in the memorandum of acknowledgment and the clerk's certificate that the wife relinquished dower does not import that she only intended to release dower, the title being in her, and no right of dower existing. The statement as to dower must be regarded as surplusage.

White & Reeves for appellant.

Z. W. Bugg for appellee.

LEE v. COMMONWEALTH.

Filed June 15, 1886. Appeal from Jefferson Circuit Court. Opinion of the court by Judge Pryor, reversing.

Criminal law—Embezzlement—Appellant being indicted for embezzlement in fraudulently disposing of funds that came to his hands by virtue of his office as treasurer of a corporation, and the proof conducing to show that the funds, for which he failed to account, came to his hands prior to his election as treasurer, the jury should have been instructed that if the accused had accounted for all the funds received by him after he was elected treasurer, they should find him not guilty.

JOSEPH v. COMMONWEALTH.

Filed June 15, 1886. Appeal from Floyd Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Contradicting witness—The court having permitted the defendant to recall a Commonwealth witness, and in the presence of the jury to lay the foundation for contradicting him, erred in afterward sustaining an objection to the statement of a witness which, according to the avowal of the defendant, would have directly contradicted the Commonwealth witness who had been recalled, and would have conduced to show his prejudicial evidence to be false.

2. Continuance—An important witness for the defendant having left the courthouse after she was sworn without the knowledge or consent of the defendant and by the procurement of one who was aiding in the prosecution, as the defendant stated in his affidavit, the court erred in overruling the defendant's motion to discharge the jury and continue the case after it was found the attendance of the witness could not be procured.

Weddington & Goble for appellant.

ROBBIN'S EX'OR v. ROBBINS.

Filed June 15, 1886. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Pryor, affirming.

1. Partnership—Where a surviving partner asserts a claim against the estate of the deceased partner for his part of a note executed by the firm and assigned by the payee to the surviving partner the claim must be supported in some other way than by the testimony of the claimant and the production of the note, the presumption being that the note was paid with partnership funds.

2. Executors and administrators—Where an executor has made defense to an action for the protection of his own private interests and in direct antagonism to the estate he represents, he must pay out of his own pocket for services rendered by attorneys in the defense.

Win. Lindsay, C. W. West and Edward W. Hines for appellant.

Leslie T. Applegate for appellee.

JACOBS, &c. v. CASE.

Filed June 15, 1886. Appeal from Mason Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Peremptory instruction—If the plaintiff fails to sustain by proof the allegations of his petition the court may on motion instruct the jury to find for the defendant, although a motion for nonsuit may have been previously overruled.

2. Husband and wife—Parties to actions—In an action concerning either the separate or general property of a married woman she is a necessary party, and her title thereto can not be affected by an action brought against her husband alone, though pleaded and relied on by him as a defense.

L. W. Galbraith and Emery Whitaker for appellants.

Campbell & Worthington for appellee.

JENKINS v. COMMONWEALTH.

Filed June 17, 1886. Appeal from Franklin Circuit Court. Opinion of the court by Judge Pryor, reversing.

Criminal law—Conspiracy to murder—Although appellant did not strike the blow that resulted in the death of the deceased, yet if he conspired with his brother, who struck the fatal blow, to take the life of the brother of the deceased, or to inflict upon him great bodily harm, and the deceased interposed only to prevent them from carrying out their purpose, and was killed by the brother of appellant, appellant is equally guilty with his brother; but if no such conspiracy existed appellant is not guilty unless he actively aided or abetted in the killing, and the jury should have been instructed that "if the deceased entered into the fight not to keep the peace or prevent a felony, they should not find the accused guilty unless they believe he struck the blow that killed deceased, or aided or abetted some or one of the other defendants in the indictment in producing his death."

John Rodman, J. A. Scott and O. D. McManama for appellant.

P. W. Hardin for appellee.

HASTY'S HEIRS v. BERRY.

Filed June 17, 1886. Appeal from Powell Circuit Court. Opinion of the court by Judge Pryor, affirming.

Homestead—When a debtor reserves the right of homestead in a deed of trust for the benefit of creditors, a creditor who accepts the provisions of the deed by sharing in the distribution under it can not afterward subject the homestead to the payment of the balance of his debt.

Wood & Day for appellants.

W. H. Holt for appellee.

BLEDSON'S EX'OR v. BLEDSON, &c.

Filed June 17, 1886. Appeal from Gallatin Circuit Court. Opinion of the court by Judge Holt, reversing.

1. Verdicts—The verdicts of juries are to be favorably construed and technical objections disregarded.

“We, the jury, find this not to be the will of the testator, Samuel Bledson,” written upon the back of one of the instructions, is executed as the verdict of the jury in a will case, its meaning being unmistakeable.

2. Separation of jury—The fact that two of the jurymen separated from the others for a few moments after the cause had been submitted to them for a verdict, and before its rendition, does not vitiate the verdict, the appellees having nothing to do with the separation, and it not appearing that during the separation the jurymen who so absented themselves were approached in any way, or that anything occurred which to any extent influenced the verdict.

3. Importunity alone not sufficient to set aside will—While importunity alone, disconnected fraud or influence, is not sufficient to set aside a will, an instruction to the jury that undue influence obtained by importunity, and which gives dominion over the will of the testator to such an extent as to destroy his free agency, will vitiate a writing purporting to be a will, which is the product of such importunity or influence, is not objectionable.

4. Instruction should not single out particular fact—While the fact that the testator has made an unequal disposition of his property among his children is a circumstance which may properly be shown in evidence and considered upon the question of capacity and undue influence, it is improper to single it out from the other evidence and instruct specially as to it.

John W. Rodman and Brown, Masterson & Gaunt for appellant.

J. J. Landrum for appellees.

WYATT v. COMMONWEALTH.

Filed June 19, 1886. Appeal from Madison Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Dying declarations—It is essential to the admissibility of statements as dying declarations, and is a preliminary fact to be proved by the party offering them in evidence, that they were made under a sense of impending death, and when every hope of this world was gone.

2. Continuance—It is the province of the judge and not of the jury to de-

termine whether statements are admissible as dying declarations, but after the evidence is admitted its credibility is entirely within the province of the jury, who are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give to the testimony only such credit as upon the whole they may think it deserving. In this case the court should have granted a continuance because of the absence of a witness who would have stated facts showing that certain statements, admitted as dying declarations, were not made under such circumstances as to render them admissible, and that they were not worthy of credit.

W. B. Smith, R. H. Crook and S. D. Parrish for appellant.

P. W. Hardin for appellee.

MARTIN v. CARVER'S ADM'R.

Filed June 19, 1886. Appeal from Carroll Circuit Court. Opinion of the court by Judge Holt, affirming.

1. Vendor and vendee—When title passes—The purchaser of real property by executory contract is the equitable owner, and must sustain any accidental loss occurring after his purchase and before the conveyance of the legal title, he being also entitled to any benefit which may accrue to it during that time.

2. Parties to action—One who had sold land by executory contract having died before a conveyance was made, his heirs were not necessary parties to an action by his administrator on the purchase money notes, they having united in a deed conveying the legal title and placed it in the possession and under the control of the court, the administrator having filed it with his petition.

Martin & Ratcliffe for appellant.

Winslow & Winslow for appellee.

WESTERN ASSURANCE CO. v. RECTER.

Filed June 19, 1886. Appeal from Warren Circuit Court. Opinion of the court by Judge Pryor, reinstating upon the docket.

Appeal from Superior Court—Jurisdiction—Where an appeal is granted by the Superior Court to the Court of Appeals the motion will be considered in connection with the order granting the appeal, and if the ground of the motion was that the questions involved are novel and important the court will assume that the appeal was granted on that ground, although the certificate of two of the judges does not appear in the record.

J. A. Mitchell and Wm. Lindsay for appellant.

Wilkins & Sims, W. T. Cox and E. W. Hines for appellee.

SUPERIOR COURT ABSTRACTS.

ROE v. YOUNG'S ADM'R.

Filed June 2, 1886. Appeal from McCracken Circuit Court. Opinion of the court by Presiding Judge Richards, affirming.

Practice in civil cases—Judgments—When a defendant is regularly summoned he must either file his defense within the time prescribed by law or show cause for a continuance. If he neglects this course and permits a

judgment to be rendered against him he can not, in an action to enforce that judgment, rely upon matters that should have been pleaded in the original action.

Bigger & Reid for appellant.

L. D. Husbands for appellee.

STRIGER v. DARNELL.

Filed June 2, 1886. Appeal from Fleming Circuit Court. Opinion of the court by Presiding Judge Richards, reversing.

Slander—Where the finder of lost goods knows, or has the immediate means of knowing, who is the owner, and, instead of returning the goods, converts them to his own use, such conversion will constitute larceny, and a denial of the possession of the goods is, in contemplation of law, a conversion. Therefore, words charging that another had found a pocket book and, knowing the owner, had removed it from the spot where it had been dropped, and had placed it out of the owner's sight, were slanderous, being repeated after the person concerning whom they were spoken had denied finding the property, which was equivalent to charging him with converting it to his own use.

John S. Powers and Cassidy & McCartney for appellant.

W. J. Hendrick for appellee.

MOORE'S ADM'R v. MOORE. &c.

Filed June 2, 1886. Appeal from Green Circuit Court. Opinion of the court by Judge Bowden reversing.

Executors and administrators—Heirs filed a petition and procured a decree for the sale of lands for partition, and the court in that case made an order directing the administrator to pay the attorneys who had done the work for them. It being thought desirable not to execute the decree immediately the administrators paid the attorneys out of another fund in which all had the same interest. It finally turned out that no sale was made under the decree. Held—That the administrator is entitled to credits for the amounts thus paid to attorneys under the order of court. It is fairly inferable that the heirs expected and desired the payment to be made in that way.

Ward & Henry for appellant.

Buckner & Allen for appellees.

DEPPEN v. SOUTHERN MUTUAL LIFE INSURANCE CO.

Filed June 2, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Bowden, affirming.

Life insurance—Failure to pay premium note—Where a policy of life insurance provided that "the nonpayment of a note given for a premium when due shall be an abandonment of the contract, with the same effect as the nonpayment of the premium for which it is given, without notice to the parties interested, or tender of the note," and a note given for a premium itself provided that if not paid at maturity it should be void, the failure to pay the note at maturity was an abandonment of the contract, just as the failure to pay the premium when due would have been if no provision for an extension had been made by the execution of the note, and it was not necessary for the company to return the note or give notice to the insured.

Barnett, Noble & Barnett for appellant.

A. P. Humphrey and Wm. Mix for appellees.

KELLY v. DAVIS.

Filed June 2, 1886. Appeal from Henry Circuit Court. Opinion of the court by Judge Bowden, reversing.

1. Verdict tested by instructions—A party can not assail a verdict as contrary to law if it is justified by the instructions given to the jury as the law. He must assail the instructions.

2. Damages for breach of contract to rent—Where one fails to deliver possession of a farm which he has contracted to rent to another the disappointed party is not in every instance limited to the difference between the rental value and the agreed price, but may allege and recover damages for such special injuries as legitimately and directly arise out of the breach, such as expenses incurred in preparing to remove to the premises; and it has been held that there could be special recovery for time lost in seeking another place or other employment, but all the cases agree that profits which might have been made are too remote.

Carroll & Barbour and W. P. Thorne for appellant.

B. S. Robbins and O. H. Pollard for appellee.

ENDERS v. EHRESMAN, &c.

Filed June 2, 1886. Appeal from Campbell Chancery Court. Opinion of the court by Judge Ward, affirming.

Parties to actions—In an action by the widow of the payee of a note to recover its possession, and to have property which had been mortgaged to secure it sold for its satisfaction, the administrator of the payee was a necessary party. The allegation that the plaintiff first administered upon her husband's estate and that the estate has been settled does not authorize her to maintain the action without making the present administrator a party.

C. L. Raison, Jr., for appellant.

W. J. Wright for appellees.

WADDELL v. COMMONWEALTH.

FLEMING v. SAME.

TAYLOR v. SAME.

Filed June 2, 1886. Appeal from Jefferson Circuit Court. Opinion of the court by Judge Ward, affirming.

Indictment—Setting up faro bank—An indictment under section 6 of article 1, chapter 47, General Statutes, for setting up, keeping and exhibiting a faro bank, need not allege an actual betting at which money was won or lost. When the statute designates a game, such as faro bank, which is not only a game used in gambling, but imports that the stake is up and really to be played at or for, it is not necessary to allege or prove more than that which must be proved in order to meet the requirements of the terms employed. It was, therefore, sufficient in these cases to allege that the defendant "did unlawfully set up, keep and exhibit a faro bank."

Kohn & Barker and F. Hagan for appellants.

A. G. Caruth, B. W. Duke and P. W. Hardin for appellee.

ROBINSON & CO. v. GARVER, &c.

Filed June 14, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Bowden, dismissing as to one appeal and affirming as to others.

1. Debtor and creditor—Preference valid in another State valid here—An insolvent debtor resident in another State preferred a creditor, also resident there, by transferring to him policies of insurance on goods destroyed by fire, and the preferred creditor instituted suit on one of the policies in the courts of that State. Subsequently this action was instituted by a Kentucky creditor to have the act of preference declared as a legal assignment for the benefit of all the creditors, and all of the insurance companies which were foreign corporations doing business in Kentucky were made defendants. Held—That the chancellor properly refused to require the insurance companies to bring the fund into court, the act of preference being valid under the laws of the country where it was done, and there being, therefore, nothing upon which the courts of this State can take hold.

2. Warning order attorney—An error in permitting an affirmative defense to be made by a warning order attorney can not be considered prejudicial, as it merely prevented the plaintiffs from getting a judgment which they were not entitled to.

3. Appeals—Jurisdiction—A warning order attorney having, without objection, remitted so much of the fee allowed him as left only \$99, and the remission having been accepted by the court and no appeal then asked for, this court has no jurisdiction of an appeal subsequently granted.

J. S. Kline for appellants.

John B. Baskin for appellee.

L. & N. R. R. CO. v. BOARD OF TRUSTEES OF LEBANON.

Filed June 14, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Bowden, affirming.

Criminal practice—Service of summons on corporation—When a prosecution against a corporation is by summons in a police court the summons should be executed by reading it to the officer or agent of the corporation upon whom the summons should be served if it were upon an indictment, a summons on an indictment being served as a summons in a civil action.

Wm. Lindsay and W. J. Lisle for appellant.

RICHMOND NATIONAL BANK v. COONS, &c.

Filed June 14, 1886. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Ward, affirming.

Bills and notes—A note made payable at a bank in this State, and endorsed to and discounted by a bank in another State, is not placed on the footing of a bill of exchange.

Wood & Day for appellant.

H. L. Stone for appellees.

CITY OF COVINGTON, &c. v. RICHARDSON.

SAME v. SULLIVAN.

Filed June 14, 1886. Appeals from Kenton Chancery Court. Opinion of the court by Judge Ward, reversing.

1. Street improvements—Under the charter of the city of Covington it must be shown, as a condition precedent to the city's right to make an improvement at the expense of property owners, that the proceedings of the council touching the improvement have been referred to the committee on law in conjunction with the city attorney, and that they have made a report as required by the charter, but it is immaterial that the report was not made until after bids were received and the work let out, as no binding contract can be consummated until the report has been made.

2. Construction of sewers by city—The city council is the judge of the necessity for sewers, and of their size and mode of construction, and unless it is shown that they have acted in an unjust or oppressive manner their action can not be reviewed by the courts.

3. Cross appeals—One appellant can not complain of a judgment against him in favor of another appellant. There must be a party appellant who complains and a party appellee who resists that complaint.

W. A. Byrne and Hallam & Myers for appellants.

R. Richardson for appellees.

COMMONWEALTH v. SHERMAN.

Filed June 16, 1886. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bowden, reversing.

1. Change in name of plaintiff—Process on amended petition—An action required by the Code to be brought in the name of the Commonwealth of Kentucky having been brought in the name of the "State" of Kentucky, and an amended petition filed merely giving to the plaintiff the formal statutory name prescribed by law, no process on the amendment was necessary. The court knows judicially that the words "State" and "Commonwealth" are used without discrimination by the legislature.

2. Jurisdiction of action for fine—The Jefferson Court of Common Pleas has jurisdiction of an action in the name of the Commonwealth to recover a fine of an agent of a life insurance company for transacting business as such without license.

3. Repeal of statute—The statute which provides that "no new law shall be construed to repeal a former law as to any offense committed against the former law" applies to every new law which repeals a former law, whether by express words or by implication.

Helm & Bruce for appellant.

W. P. D. Bush for appellee.

HAYS v. WILLIAMS, &c.

SAME v. SPRIGG, &c.

WILLIAMS' ADM'R v. HAYS, &c.

Filed June 16, 1886. Appeals from Hardin Circuit Court. Opinion of the court by Judge Bowden, reversing first case and affirming last two cases.

Sheriff—Liability of deputy's sureties—A sheriff employed a deputy who was to attend to all duties of the office on his ride, and was to collect and

pay over to the auditor, to the county or to others entitled, all money and taxes due from that ride, and with reference to this agreement the deputy's bond to his principal was executed, the effect of the agreement being that as between themselves the deputy was the sheriff on his ride. The deputy having failed to pay the State revenue coming from his ride for the year 1879, and the auditor being about to proceed against the sheriff, it was agreed that the amount then due by the deputy should be raised by a loan. Pursuant to this agreement the money was borrowed by the deputy on a note in bank, on which the sheriff and another were sureties, and the money paid over to the sheriff, the deputy agreeing with the sureties that if they would become bound for him he would collect the money as soon as possible out of the taxes due and pay it. The deputy having died without paying the note, and being further indebted to his principal on account of taxes collected for 1879, the sheriff seeks by this action on the deputy's bond for that year to compel the sureties of the deputy to pay the deficit, first applying to the payment of the note in bank the amount realized from tax bills for the year 1879 in the hands of the deputy, or of one employed by him when he died. Held—That the sheriff had the right to control these unpaid tax bills, first applying the proceeds to the payment of the amount due from the deputy to him on account of the taxes collected for 1879, and then to the payment of the note in which he was surety for the deputy, but the amount realized not being sufficient to pay the note after satisfying the other claim the deputy's sureties are not liable for the deficit, they never having been liable for any part of the note. The sureties of the deputy for the years prior to 1879 can not require the sheriff to credit on the amount for which they are liable anything collected on the tax bills for 1879 until all other demands held by him on the deputy have been satisfied.

J. P. Helm and Wilson & Hobson for Hays.

Montgomery & Poston for Sprigg, &c.

James Montgomery for Williams, &c.

COMMONWEALTH v. HUESER, &c.

Filed June 16, 1886. Appeal from McCracken Circuit Court. Opinion of the court by Presiding Judge Richards, reversing.

Indictment—Betting on election—An indictment for betting on an election need not allege that the defendant bet upon the success of any particular candidate.

P. W. Hardin and C. H. Thomas for appellant.

J. M. Bigger for appellees.

COMMONWEALTH v. STEPHENS.

Filed June 16, 1886. Appeal from Carter Circuit Court. Opinion of the court by Presiding Judge Richards, affirming.

Forfeited bond of witness—The appellee executed bond for the appearance of a witness "at the time and place mentioned within." What was referred to by the word "within" does not appear. At the next term of court the witness appeared and was told by the attorney for the Commonwealth that

he could go, without any notice to return at any future term. Held—That the terms of the bond were complied with and the sureties released.

P. W. Hardin and S. G. Kinner for appellant.

KAUFMAN & CO. v. LOVENTHAL, &c.

Filed June 19, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Contract to pay teacher "after paying expenses"—A teacher having been employed by an academy company to teach its school, the company agreeing to pay him for his services whatever remained after paying all expenses, a creditor seeking to subject the amount due him from the company must allege, and show, if denied, that the company has collected more than enough to pay all expenses, or that there is more than enough for that purpose that can be collected, and that there has been sufficient time in which to make the collections. The company has the right to retain all accounts a reasonable time so that it may collect them and pay what it owes.

2. Garnishment—A creditor seeking to subject a debt due his debtor can have no greater right than that which his debtor could have asserted and enforced.

Hill & Rives for appellants.

J. D. Fogle and T. L. Edelen for appellees.

AULTMAN & TAYLOR CO. v. JOPLIN, &c.

Filed June 19, 1886. Appeal from Hardin Circuit Court. Opinion of the court by Judge Bowden, reversing.

Agent's right to commission on sale by principal—Under a contract whereby appellant agreed to furnish appellees with machines and to allow them certain commissions on each sale within a certain territory, appellant was not precluded from making sales within that territory, and appellees are not entitled to commissions on sales made by appellant, there being nothing in the contract which conferred on appellees the exclusive right to sell within the designated territory.

Wilson & Hobson for appellants.

Montgomery & Poston for appellees.

BOYD v. SMOOT (THREE CASES).

Filed June 16, 1886. Appeals from Bath Circuit Court. Opinion of the court by Judge Bowden, affirming.

1. Appeals—Reversible error—An error of \$5 is too small to justify a reversal.

2. Action to falsify guardian's settlement—These being actions by appellants to falsify the settlements of appellee as guardian with the county court the burden was on appellants to show that there were errors in the settlements, and this court is not prepared to say that the lower court erred in holding that evidence was not sufficiently assuring to falsify the settlements.

W. P. D. Bush and R. Gudgell & Son for appellant.

Wm. Lindsay and V. B. Young for appellee.

FOOT v. CULBERTSON.

McCORMICK v. SAME.

Filed June 19, 1886. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Richards, overruling motion.

Warning order attorney—Collection of fee—This court having made an allowance to a warning order attorney for his services to be paid by the appellant upon whose motion he was appointed, has no power to collect of appellant by rule the amount thus allowed. This court has no authority to render judgment against a party for costs incurred by himself, and has no power to collect by rule what it has no power to enter judgment for.

W. H. Julian for motion.

C. AULTMAN & CO. v. GIBSON, &c.

Filed June 19, 1886. Appeal from Woodford Circuit Court. Opinion of the court by Presiding Judge Richards, reversing.

Transfer to ordinary docket—Where a case is properly pending in equity, either party is entitled to the decision of the chancellor upon the equitable issues before any transfer can be ordered to the other docket; and while the chancellor has the power to order any issue out of chancery to be tried by a jury, and when the verdict is returned can enter judgment accordingly or wholly disregard it, this was not the power exercised in this case. Here the issues were regularly transferred to the ordinary docket to be tried by a jury, the chancellor reserving no control over the verdict except such as the judge would have in an ordinary action, and as there were equitable issues not disposed of the transfer was improper.

Ed. M. Wallace for appellants.

D. L. Thornton for appellees.

BUCKLER, &c. v. COMMONWEALTH.

Filed June 19, 1886. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Richards, affirming.

1. Commonwealth's attorney can not postpone payment of fine—When a judgment for a fine and imprisonment has been entered the Commonwealth's attorney has no authority to release or postpone the penalty.

2. Forfeited bond—Effect of governor's remission of fine—The governor's remission of all of a judgment for a fine "except commissions, fees and costs" is no reason why the sureties in the bail bond should be released, it not appearing that the defendant has satisfied that part of the judgment not remitted; nor does the fact that the defendant's remaining liability upon the judgment is less than the bail bond in anywise affect the sureties, the extent of their liability not being made to depend upon the amount of the judgment against their principal.

R. W. Slack for appellants.

P. W. Hardin for appellee.

ALLEN, &c. v. WESTFALL.

Filed June 19, 1886. Appeal from Meade Circuit Court. Opinion of the court by Judge Ward, affirming.

Petition to falsify guardian's settlement—Objection too late—While a petition to surcharge and falsify settlement made by a guardian before the county court must point out the specific errors complained of, and no others can be inquired into, yet as no objection was taken to the petition in this case, either by demurrer or motion to make more specific, and an answer

was filed putting the matters complained of in issue, and the case was referred to the master to hear proof and correct the settlements if errors were found, it was thereafter too late to object that the petition was not sufficient, the petition stating in a general way the errors complained of.

H. T. Kendall for appellants.

Lewis & Fairleigh for appellee.

BAILEY, &c. v. NICHOLS, SHEPPARD & CO.

Filed June 19, 1886. Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Ward, affirming.

1. Sales of personal property—Right to rescission—The purchaser of a traction engine is not entitled to a rescission of the contract of sale because of a breach of warranty, having failed to return or offer to return the engine within a reasonable time after he ascertained that it would not perform the work it was warranted to perform, and having continued its use after he ascertained that fact.

2. Exceptions to depositions—This court can not decide that the lower court erred in sustaining an exception to a deposition for want of sufficient notice, when it does not appear from the officer's certificate or otherwise that the party excepting was not present at the taking, especially where the attorney accepted notice, as an attorney ought not to accept notice unless he expects to attend; and if anything occurs after he accepts the notice which makes it inconvenient for him to attend it ought to be shown on the trial of the exception.

3. Issue out of chancery—Reference to jury—Where an action is properly in equity a party is not entitled as a matter of right to have an issue of fact tried by a jury. The motion for that purpose is one addressed to the sound discretion of the chancellor, and this court can not revise his action unless there has been a palpable abuse of this discretion.

Gilbert & Reed for appellants.

Henry Burnett for appellees.

SMITH, &c. v. DINGUID, &c.

SAME v. BLANKENSHIP.

Filed June 19, 1886. Appeals from Christian Circuit Court. Opinion of the court by Presiding Judge Richards, affirming.

1. Sale by child of interest in father's estate—The sale by a child of his interest in the estate of his father, the father being still alive is void, unless the father unites in the contract.

2. Ademption of legacy—A testator devised to S. and wife a tract of land upon condition that they were to take it at a valuation of \$6,500, and pay \$1,000 to M., \$1,000 to G. and \$2,500 to the testator's estate, leaving \$2,000 to be retained by them. The will further provided that the wife of S. might pay the \$1,000 bequests out of her interest in her father's estate. A few days after the testator executed his will he executed to S. and wife a deed reciting that, in consideration of love and affection, he wills and bequeaths to them an interest of \$2,000 in certain parcels of land, the same land he had devised to them, which he again values at \$6,500; and for the consideration of S. and wife relinquishing to M. and G. all the wife's interest in the estate of her father, and the further consideration of \$500 for repairs and \$2,000 to be paid in notes, "making in the aggregate \$6,500," he doth grant,

bargain and sell the said land to the said S. and wife. Held—That it was the intention of the testator that these two instruments should be read together, and if the agreement in the deed whereby S. and wife were to relinquish their interest in the estate of the wife's father had been a valid agreement, it would have amounted to an ademption of the legacies to M. and G., it being evident that that interest was valued at \$2,000, the amount of the legacies, but the father being still alive the agreement was void, therefore, the bequests took effect immediately upon the probate of the will, and became a charge upon the land, and S. and wife having retained the land he is personally liable for these bequests.

J. I. Landes for appellants.

H. A. Phelps & Son for appellees.

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KENTUCKY COURT OF APPEALS.

TRIPLETT v. COMMONWEALTH.

(Filed June 5, 1886.)

1. Criminal law—Former acquittal—Burglary and larceny—Failure to plead—An acquittal or conviction of the offense of burglary is a bar to the prosecution for a larceny, forming part of the same transaction, for which the defendant was tried under the indictment for burglary.

2. Where a plea of former acquittal or conviction is the only plea entered, the defendant's failure to sustain his plea will not authorize the court to instruct the jury to find the defendant guilty. If the defendant pleads, no confession, except confession of guilt in open court by the accused in person, will authorize a judgment of conviction.

Query: Does the defendant's silence or failure to plead amount to a confession of guilt? The court suggests that where the defendant refuses to file any plea the safer rule is to have the plea of not guilty entered, and counsel assigned.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Pryor.

The appellant, Dick Triplett, was indicted by the grand jury of Fayette county for grand larceny in feloniously taking and carrying away \$30 in United States currency, bank notes, etc., the personal property of one Ed. Caldwell.

On the trial of the indictment the accused entered the plea of former acquittal, alleging in substance that he had been indicted in the same court for burglary, in breaking and entering the dwelling of Ed. Caldwell with the intent to steal therefrom; that the present indictment for larceny is for stealing

the same \$30, a part of and connected with the same transaction, constituting the alleged burglary for which he had been previously tried; that the Commonwealth elected to try him for the burglary, and upon the hearing the jury returned a verdict of not guilty. He pleads the same as a bar to the present prosecution. The record of the indictment for burglary and the trial resulting in a verdict of not guilty was offered as evidence, and the accused then proposed to prove that the alleged taking of the \$30 was connected with and a part of the same transaction constituting the burglary, at the same place and on the same occasion.

The only question is, did the plea and proof, if conceded to be true, constitute a bar to the indictment for grand larceny? We think the bar was complete. At common law in an indictment for burglary a count might be added for the larceny where there had been an actual taking, and it, therefore, resulted that an acquittal of the burglary with intent to steal constituted no bar to a prosecution for the actual theft. Without the intention to commit a felony the mere fact of breaking would not at common law constitute a burglary, and when the intent to steal is charged and the party acquitted, it would seem that a subsequent indictment for grand larceny, with the same facts developed on the trial, would be placing the accused in jeopardy the second time for the same offense. The weight of authority, we are aware, is adverse to such a view of the question, but the whole reason and philosophy of the law, as well as justice to the accused, requires a different ruling. Mr. Bishop, in alluding to the decisions on this class of cases, takes occasion to say that "on principle we may question whether they do not press more heavily against defendants than the humane policy of our criminal jurisprudence justifies." (Volume 1, Bishop Criminal Law, page 1064.)

The dissenting opinion in the case of *Wilson v. State*, 24 Conn., 57, lays down the correct rule, viz.: "When a criminal act has been committed, every part of which may be alleged in a single count, and proved under it, the act can not be split

into several distinct crimes and a separate indictment sustained on each, and whenever there has been a conviction for one part it will operate as a bar to any subsequent proceedings as to the residue."

In a note to this dissent in volume 1, Bishop Criminal Law, it is said: "It would be a very bold thing to say that, leaving out of the account what has been adjudged by the courts, the weight of reason is not clearly with the dissenting opinion." The prosecutor may elect whether his indictment shall be for burglary or grand larceny, but he can not make two offenses out of the one, and when indicted and tried for either the bar becomes complete as to both the burglary and larceny. In Georgia it has been held that a jeopardy on one indictment will bar a second "whenever the proof shows the second case to be the same transaction with the first." The intent to steal may be shown by proof establishing the actual theft, and when the Commonwealth has made out the case of burglary in this way it is a novel ruling, although sustained by the weight of authority, to hold that two convictions may be had for offenses growing out of the same transaction. It has been held that when one steals two pigs by driving them off from the owner at the same time, he may be convicted of larceny for stealing the one pig and then again convicted for stealing the other. This is not the rule in Kentucky. In *Fisher v. Commonwealth*, 1 Bush, —, the accused in the same act, and with like intent, took a horse, wagon and harness from H. The indictment was for stealing the horse, another indictment for stealing the wagon and harness, and why there was not a third indictment for stealing the harness does not appear, perhaps the harness was in the wagon. On the trial for stealing the horse the accused was acquitted, and this was held to be a bar to the indictment for stealing the wagon and harness. Mr. Bishop says, and this is the true doctrine, "that although when a man has done a criminal thing, the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once." So in this case the

prosecutor has attempted to carve out of the transaction the crime of burglary of which the accused was acquitted, and he should not now be allowed to carve out the crime of larceny. The plea of former acquittal may not be sufficiently specific, and for this reason a demurrer was sustained, but it then appears that the accused waived a formal arraignment, pleaded former acquittal and in support of the plea introduced the proof already adverted to. The plea of former acquittal was the only plea entered, the Code requiring that such facts must be alleged by special plea. There was no plea of not guilty, and the Commonwealth, without offering proof, had an instruction to find the defendant guilty upon the failure of the accused to sustain the plea of former acquittal. The accused can not be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land, nor can he be compelled to give evidence against himself. (Section 12, Bill of Rights.) Does his silence or failure to plead amount to a confession of guilt? This is a grave question and not necessary to be determined in this case, as the reversal must go on other grounds. The safer rule would be where the accused refused to file any plea to have the plea of not guilty entered and counsel assigned, but when he does plead, no judgment by confession, except that of confession of guilt in open court by the accused in person, will authorize a judgment of conviction.

Reversed and remanded for proceedings consistent with this opinion. (Ravenscraft v. Commonwealth, 7 Ky. Law Rep., 826.)

Park Phipps for appellant.

FORT HILL STONE CO. v. ORM'S ADM'R.

(Filed May 29, 1886.)

When one enters into the service of another he assumes to run all the ordinary risks pertaining to such service, and when a number of persons contract to perform service for another, the employes not being superior or subordinate the one to another in its performance, and one is injured

through the negligence of another, they are regarded as the agents of each other, and no recovery can be had against the employer.

Appellant was the owner of a stone quarry on the side of a hill, at the foot of which was machinery for crushing the stone. The stone was moved by trucks to a turn-table on the side of the hill, from which it was carried by an inclined railway to the hopper at the foot of the hill. Several men were employed at the turn table to shove the loaded cars to the top of the incline, the special duty of one man being to attach to the loaded car a cable for which he received extra pay; two other men were employed at the foot of the hill to unload the cars and superintend the crushing of the stone. Through the negligence of some one at the turn table a car was shoved down the incline without the cable being attached, and one of the men at the foot of the hill was killed. Held—That the appellant is not liable.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

Appellee brought this action to recover for the destruction of the life of his intestate by the alleged willful neglect of appellant's servants or agents, the intestate himself being one of them.

It appears from the evidence that appellant was the owner of a stone quarry on the side of a hill, at the foot of which, about seventy-five yards from the quarry, was located the machinery for crushing the stone which was transported thence by railroad to market.

Upon the same terrace where the stone was quarried was a track upon which cars or trucks loaded with stone were moved by hand to a turn-table, and thence by a track descending at a grade of 45 degrees or more to what was called the hopper house at the foot of the hill, and over the machinery for crushing the stone.

Two persons were employed in the hopper house in transferring the stone from the cars to the hopper, and in seeing that the stone did not choke it, the intestate at the time he was killed being one of them.

About twenty feet above the turn-table was a friction pulley, or drum on which was a wire rope, one end of which was attached to the empty car at the hopper house and the other end

intended to be attached to the loaded car before being shoved from the turn-table upon the track leading to the hopper house, so that the former would be drawn up at the same time the latter would go down, the track being constructed so as to allow them to pass.

The drum was in charge of a single person who received 75 cents per day in excess of that paid the other hands engaged in moving the stone, and it was his duty when receiving a signal from one of the men in the hopper house to let down a loaded car to go forward to the front of the level on which the drum was situated, and if he saw the cable was fastened to the loaded car and the car was all right to be let down, to give the signal to the men at the turn-table to push the car off.

It appears that it requires four or five men to push the loaded car from the turn-table to the top of the incline, it being the especial duty of one of them to hitch the cable to it before it descends, who receives 10 cents per day extra pay for that service.

According to the evidence of the man at the drum they had been at work about one-half hour in the forenoon when he, being at his place at the drum, heard the men at the turn-table say "shove," whereupon he went forward to see what they were doing, and saw they were shoving the car off before the cable was hitched to it; that the front wheels of the car were near to or about gone over the top of the incline, and though he halloed to them not to let it go, they continued to push, and the result was that it descended with such rapidity and violence as to knock in one side of the hopper house and so severely injure the intestate that he died in a short time.

It is clear that the injury to the intestate was the result of the failure of the person whose duty it was to hitch the rope to the loaded car before it was pushed upon the incline. The testimony of that person is that the other hands shoved the car off the turn-table so rapidly or suddenly that, though he tried to do so, he was unable to hook the rope to it before it went over the top of the incline.

The evidence does not authorize us to attribute negligence to the person in charge of the friction pully, for it appears that the car was started down the incline before he gave the signal, and perhaps in spite of his efforts to prevent it; nor is it a matter of importance in what part of the hopper house the intestate may have been when the car struck him, for his companion was also injured, and it would be hardly probable that any one in the hopper house could escape injury under such circumstances.

The destruction of the life of the intestate being caused by the negligence of the persons whose business it was to shove the loaded car upon the incline, in failing to hook the rope to it, it is not material whether the negligence is to be attributed to the one whose especial duty it was to attach the cable, or to those with him, or to all of them.

It is shown that the machinery and appliances for moving cars upon the incline were in sound working condition, and that the man, by properly using the friction pully, could control the speed of the descending car, and let it go down to the hopper house with comparative safety.

The single inquiry then is whether appellant can be made liable under the statute for the destruction of the intestate's life by the negligence of those whose duty it was to shove the car from the turn-table to the incline, and to attach the cable to it.

The rule which has in similar cases heretofore been laid down by this court is that when one enters into the service of another he assumes to run all the ordinary risks pertaining to such service. And when a number of persons contract to perform service for another, the employes not being superior or subordinate the one to another in its performance, and one is injured through the negligence of another, they are regarded as the agents of each other, and no recovery can be had against the employer. (Louisville, C. & L. R. R. Co. v. Caven, 9 Bush, 599; Doyle v. Swift Iron Works, 5 Ky. Law Rep., 59; L. & N. R. R. Co. v. Collins, 2 Duvall, 114.)

This rule has been so frequently applied in cases like the present by this court, and is so universally sanctioned by courts of other States, and the reasons for it appear to be so in accordance with public policy that we do not feel authorized to disregard it.

The person or persons to whose negligence the death of the intestate in this case is attributable had no right or power to control and direct him, nor can they be regarded as having been in any respect his superiors in the discharge of the duties pertaining to the business they were all engaged in, but were equal and co-ordinate, and, therefore, they and the intestate must be considered as the agents of each other.

Applying this rule, appellant can not, according to the evidence before us, be liable for the destruction of the life of appellee's intestate, not having, in legal contemplation or in fact, been guilty of the negligence that caused it, and as the record stands, we think the peremptory instruction to find for the defendant ought to have been given.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

J. P. Hobson and Bush & Robertson for appellant.

Montgomery & Poston for appellees.

VOWELLS v. COMMONWEALTH.

(Filed April 10, 1886.)

1. Indictment—Setting up faro bank—Exclusion from office and suffrage—An indictment charging that the defendant did set up, exhibit and keep a faro bank for himself and another charged but one offense, and a demurrer thereto was properly overruled, as well as a motion to require the attorney for the Commonwealth to elect which charge he would prosecute.

2. The statute is peremptory that a person indicted for the offense of setting up a faro bank "shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage and from holding any office of honor, trust or profit." It is not, therefore, necessary to instruct the jury in regard thereto, but it is the duty of the court after conviction to pronounce the judgment prescribed by the statute.

3. The legislature has the power under the Constitution to fix the penalty of exclusion from office and from suffrage for the offense of setting up a faro bank.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

The charge in the indictment against appellant is that he did, on the — day of July, 1883, unlawfully set up, exhibit and keep for himself and another a faro bank, whereby money and other things might be and were won and lost, etc.

The averment that the offense was committed on the — day of July, 1883, imports the commission of it anterior to the 24th day of the same month, when the indictment was found, and can not be fairly made to mean it was subsequent to that time.

The language of the statute under which the indictment was found is, "whoever shall set up, exhibit or keep for himself or another, etc."

While this language might indicate a possible distinction between the meaning and effect of the three acts of setting up, exhibiting and keeping a faro bank, it can certainly be no objection to the indictment in this case that they are all charged to have been committed at one and the same time. For setting up, exhibiting and keeping a faro bank may all be done at the same time and place, and, when combined, constitute but one offense. In fact it is difficult to perceive how a faro bank may be set up without being at the same time exhibited and kept. Nor is it a valid objection to the indictment that appellant is charged with setting up, exhibiting and keeping a faro bank for himself and another. For whether he committed the act alone and for his sole benefit, or jointly with another, he is equally guilty under the statute.

As there was in the meaning of the statute but one offense charged in the indictment, and the charge is in the language of the statute, the court properly overruled both the demurrer and motion to require the attorney for the Commonwealth to elect which charge he would prosecute.

By the verdict of the jury appellant was found guilty and his fine was fixed at \$500 and costs, being the penalty prescribed by section 6, article 1, chapter 47, General Statutes. And the court, therefore, rendered judgment therefor, and also adjudged that appellant be deemed infamous and forever debarred from exercising the right of suffrage and from holding any office of trust or profit.

Counsel contend that the lower court erred to his prejudice in failing to instruct the jury fully in regard to the penalty prescribed by the statute. By the section mentioned it is provided that a person convicted of the offense for which appellant was indicted shall be fined \$500 and costs, and imprisoned till the same be paid or imprisoned not more than one year, or both so fined and imprisoned. As a discretion is thus given to the jury as to the punishment by fine and imprisonment, it was proper for the court, as was done in this case, to instruct them in regard thereto.

But the statute is peremptory that a person indicted for the offense charged in this case "shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage and from holding any office of honor, trust or profit." And it was not, therefore, necessary to instruct the jury in regard thereto. Nor had the court any discretion, but it was its duty after conviction to pronounce the judgment prescribed by the statute. We do not perceive, therefore, how appellant was prejudiced by the failure of the court to instruct the jury in regard to a punishment fixed by the statute, and which inevitably follows conviction, and about which the jury has no discretion.

By section 4, article 8 of the Constitution it is provided that "laws shall be made to exclude from office and from suffrage those who shall thereafter be convicted of bribery, perjury, forgery or other crimes or high misdemeanors." In our opinion legislative power clearly exists under that section to fix the penalty of exclusion from office and from suffrage for

the offense for which appellant was in this case indicted and convicted. And it has never been called in question.

The motion for a continuance was not based on the affidavit of appellant, or in any other such way supported as required the court to postpone the trial. If he had been in fact unable from sickness to attend the trial it could have been made to appear to the satisfaction of the court when the case was called, for we think it clearly appears he knew about when the case would be called, and could have easily had the evidence of his inability to attend the trial before the court.

The evidence on the motion for a new trial in regard to appellant's inability to attend the trial of the case does not by any means satisfactorily show that it was without his own fault.

We think the court properly disregarded the application of his attorney to continue the case, and also properly overruled the motion for a new trial. There being no error to the prejudice of appellant's substantial rights the judgment is affirmed.

Haycraft & Slack for appellant.

P. W. Hardin for appellee.

STRATTON v. COMMONWEALTH.

(Filed June 5, 1886.)

Appeals—Jurisdiction in felony cases—To give to the Court of Appeals jurisdiction in a felony case a certified transcript of the record must be filed in the clerk's office within sixty days after the judgment unless the Court of Appeals, by an order made within that time, grants further time to lodge the transcript, or unless time be given beyond the term at which the judgment is rendered to present a bill of exceptions, and the fact that the record was mislaid by the clerk, and not found until the expiration of the sixty days, can not confer jurisdiction upon the court to hear the appeal.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Lewis.

Under an indictment for willfully burning a barn appellant was, at the July term, 1885, of the court tried and convicted. And the motion for a new trial being overruled, an appeal was

prayed, and by an order of court his bill of exceptions duly signed was, during the same term, filed and made part of the record. But the transcript of the record in the case was not lodged in the clerk's office of the Court of Appeals until March 27, 1886. And the question is thus presented whether under the Criminal Code we have the power to now entertain the appeal.

Section 336 prescribes the time and manner in which an appeal in a felony case may be taken to this court, subsection 2 thereof being as follows: "When an appeal is prayed the court shall, if the defendant desire it, make an order that an execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge a transcript of the record in the clerk's office of the Court of Appeals. After the expiration of such period the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment a certificate, as provided in subsection 3 of this section, that the appeal has been taken, or a copy of an order of the Court of Appeals granting further time to lodge the transcript."

Subsection 3 is as follows: "The appeal is taken by lodging in the clerk's office of the Court of Appeals within sixty days after the judgment a certified transcript of the record. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal."

By subsection 4 it is provided that time may be given beyond the term at which the judgment is rendered to present a bill of exceptions, in which case the transcript of the record may be filed in the clerk's office of the Court of Appeals within sixty days after the bill of exceptions is made part of the record. But the provision of subsection 4 does not apply to this case, for the bill of exceptions was filed and made part of the record during the same term (July 1885) the judgment was rendered.

It seems to us clear that in order to give to the Court of Appeals jurisdiction in a felony case a certified transcript of the

record must be filed in the clerk's office within sixty days after the judgment, or, in a state of case provided for in subsection 4, within sixty days after the bill of exceptions is made part of the record unless an order be made by the Court of Appeals granting further time to lodge the transcript.

It appears from an affidavit filed in this case that the bill of exceptions was in some way mislaid by the clerk of the lower court and could not be found until the expiration of the time within which the transcript of the record was required by law to be lodged in the clerk's office of the Court of Appeals. But that fact need not have prejudiced the defendant. For under subsection 2 the Court of Appeals had the power, by an order made within sixty days after the judgment, to grant further time to lodge the transcript. And if the loss of the bill of exceptions had been shown and a motion had been made in proper time by him the time would without doubt have been extended.

But no such order was made or applied for, and consequently this court can not take jurisdiction of the appeal without a palpable violation of the Criminal Code, and it is, therefore, dismissed.

J. S. Gollady for appellant.

CALDWELL, &c. v. McWHORTER, &c.

(Filed May 4, 1886.)

A receiver of court has no power, even under order of court, to bring an action involving the title to real estate against third parties, or to submit a controversy with third parties concerning title to real estate, and, without the consent of the real parties in interest, bind them by the judgment which may be rendered.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Lewis.

This is an appeal by E. B. and Sarah J. Caldwell from a judgment rendered in an agreed case between them and J. W. McWhorter, who, having an interest, appears for himself and the heirs of Enoch Burdett, deceased, which was submitted to

the Lincoln Circuit Court in pursuance of chapter 4, title 14, Civil Code.

The following are the material facts stated, and the question involved is as to the title to a tract of land containing 300 acres in that county:

In 1876 Enoch Burdett, residing in Casey county, died intestate, the owner of several tracts of land in that and Lincoln county, leaving about 700 collateral heirs living in different parts of this and other States.

Prior to April, 1878, a number of the heirs instituted in the Casey Circuit Court an action against the other heirs, seeking a sale of all the lands of the decedent for the purpose of a division. And while that action was pending, on motion of B. M. Burdett, one of the defendants and also chief counsel for the plaintiffs, L. W. Burdett was, April 22, 1878, by an order of the judge of that court made in vacation, without notice to the other plaintiffs or defendants, appointed a receiver, and continued to act as such until all the lands were sold, except the tract of 300 acres mentioned, there being no exception or objection to his appointment made of record by any of the parties to the action.

October 30, 1879, the question of title to the 300 acres of land, with only a partial statement of the facts upon which it depended, was, by agreement between L. W. Burdett, receiver, representing or assuming to represent the heirs of Enoch Burdett, and E. B. and S. J. Caldwell, submitted to the Lincoln Circuit Court for judgment.

The only evidence of title produced on the trial of that agreed case by L. W. Burdett, the receiver, was a deed for the land executed by Robert Wall to Enoch Burdett in 1822. But a patent for 200 acres of the tract issued by the Commonwealth to Sarah J. Burdett in June, 1877, and one of the same date for ninety-seven acres thereof issued to E. B. Caldwell, being exhibited as evidence of their title, judgment was rendered in substance that their respective titles to the land were valid against and superior to the title of the heirs of Enoch Burdett.

In the present agreed case it is admitted that there was in 1820 regularly issued by the Commonwealth to Robert Wall, the immediate vendor of Enoch Burdett, a patent for the 300 acres of land in controversy. And it being thus rendered manifest that the patents issued to the Caldwells in 1877 are void, and that neither of them have title to the land, judgment was rendered in favor of Burdett's heirs, as must have been done in the former proceeding of 1879, if the patent to Wall had been then produced. It is, therefore, evident that Burdett's heirs are entitled to recover the land in controversy, and the judgment in this case must be affirmed unless they are barred by the judgment of 1879. And the single inquiry, upon which the validity of the latter judgment depends, is whether L. W. Burdett, in virtue of his appointment as receiver by the Casey Circuit Court, had authority to submit the question of title to the land to the Lincoln Circuit Court and bind the heirs of Enoch Burdett by the judgment, though they were no parties to the proceeding in which it was rendered.

Section 18, Civil Code, provides that "every action must be prosecuted in the name of the real party in interest except as provided in section 21." And in section 21 it is provided that any one of certain fiduciaries therein named, including "a receiver appointed by a court," may bring an action without joining with him the person for whose benefit it is prosecuted. But it does not follow that it was intended by that section to give unrestricted authority to a receiver of a court to institute an action without the consent of or joining with him the persons whose rights and interests may be involved, and bind them by any judgment that he may suffer to be rendered against them.

Chapter 5, title 8, Civil Code, provides in what cases a receiver may be appointed, prescribes his duties, and confers whatever authority he has.

Section 298 is as follows: "On motion of any party to an action who shows that he has, or probably has a right to, a lien upon, or an interest in, any property or fund, the right to which is involved in the action, and that the property or fund

is in danger of being lost or removed, or materially injured, the court or judge thereof, during vacation, may appoint a receiver to take charge of the property or fund during the pendency of the action, and may order or coerce the delivery of it to him," etc.

Section 299 provides for the appointment of a receiver in an action for the sale of mortgaged property, where it is in danger of being lost, removed or materially injured, or is probably insufficient to discharge the mortgage debt.

Section 302 is as follows: "The receiver has, under the control of the court, power to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally to do such acts respecting the property as the court may authorize."

It will be perceived that the power to appoint a receiver exists under section 298 only when there is property or a fund, the right to which is involved in the action, and that he is then appointed to take charge of only such property or fund. It would, therefore, seem that he has power to bring or defend only such actions as involve the preservation of the property or fund in his charge, and the collections of rents and debts accruing therefrom.

The object of the action in which L. W. Burdett was by the Casey Circuit Court appointed a receiver was of common interest to the plaintiffs and defendants, being to sell the lands inherited alike by them from Enoch Burdett, deceased, for the purpose of a division. It is, therefore, at least questionable whether, in the meaning of section 298, the right to the 300 acres of land was involved in that action at all. And it is by no means clear that the court had the power to place it in charge of a receiver for any purpose.

But not deeming it necessary to decide whether a receiver may or not be appointed in such an action when necessary for the preservation of the property, we are satisfied it was never intended by the Civil Code, from which the receiver of court derives all his power, to confer upon him the right, even under

order of court, to bring an action involving title to real estate against third parties, or to submit a controversy concerning title to real estate with third parties, and bind the real parties in interest without their consent by the judgment which may be rendered.

The owners of real estate can not under the Code be deprived of the right to sue or defend for themselves in actions involving title thereto, and if they labor under disabilities, fiduciaries, other than receivers of courts, are expressly and specially authorized to prosecute or defend for them in such actions.

The heirs of Enoch Burdett alone had the right to submit a controversy with appellants involving the title to the land, and as they neither authorized nor were parties to the proceeding of 1879, they are not prejudiced by the judgment then rendered.

Wherefore, the judgment in this case is affirmed.

Hill & Alcorn for appellants.

Morrow & Newell for appellees.

SHELBY, &c. v. HARRISON, JR., &c.

(Filed May 6, 1886.)

1. Sales of infants' real estate—Guardian and ward—When there is no guardian of a nonresident minor in this Commonwealth the county court of the county in this State having jurisdiction to appoint a guardian may, by its order, invest the guardian appointed and qualified according to the law of the place where the minor resides with as complete authority to sue and defend for his ward as if he had been duly appointed and qualified in this State as guardian.

2. In an action under section 490 of the Code for the sale of real estate owned jointly with an infant it is not necessary that the infant defendant be served with summons; the appearance and answer of his guardian is all that is required. And while in this case the proper record evidence of the appointment and qualification of the guardian was not filed until after the sale of the property, still, the fact being established, the defect in the title of the purchasers which might otherwise have existed has been to that extent cured, and they have now no right to complain.

3. It is not necessary to the validity of a sale made in pursuance of subsection 2 of section 490 of the Code that before it is ordered by the court.

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the guardian should execute the bond required by section 493; the share of the infant remains a lien on the land until he becomes of age or until the guardian executes the bond.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

Carter H. Harrison, Jr., and Caroline Harrison brought this action under subsection 2, section 490, Civil Code, for the sale of certain tracts of land in Henderson county, a vested estate in which they owned jointly with William P. and Sophia Harrison, infants residing in the State of Illinois, who, together with Carter H. Harrison, their guardian and likewise a resident of that State, were made defendants.

In the answer filed by Carter H. Harrison he stated that, answering as the father and statutory guardian of the infant defendants and entering their appearance, he adopted the petition of the plaintiffs and each allegation thereof. And subsequently in an amended answer he stated that by an order of the Henderson County Court he was authorized to act as guardian for his wards as if he had been appointed in this State.

Appellants having become the purchasers of one of the tracts sold in pursuance of the judgment rendered in the action, prosecute this appeal from the order of court overruling their exceptions to the report of sale and confirming it.

The grounds of exception are:

1st. That the infant defendants were not served with summons, and were not represented by a guardian ad litem or statutory guardian.

2d. That no bond was executed by their guardian before the judgment was rendered.

3d. That the proof does not sustain the allegations of the petition.

It is substantially stated in the petition and answer that Carter H. Harrison, the father of the two infant defendants, was, under the laws of the State of Illinois, appointed and qualified as their guardian. And although the proper record evidence of his appointment and qualification was not filed in

this case until after the sale of the property to appellants, still, the fact being established, the defect in their title which might otherwise have existed has been to that extent cured, and they have now no right to complain on that account.

Section 11, article 2, chapter 48, General Statutes, provides that when there is no guardian of a nonresident minor in this Commonwealth, his guardian appointed and qualified according to the law of the place where the minor resides may be authorized by the county court of the county in this State, having jurisdiction to appoint a guardian, to sue for, recover and remove any personal estate of such minor, or otherwise to act as a guardian appointed here.

The Henderson County Court clearly had the power under that section, and did by its order invest Carter H. Harrison with as complete authority to sue and defend in this action for his wards as if he had been duly appointed and qualified in this State as their guardian. Moreover, by subsection 4, section 35 of the present Civil Code, which was not in the former Code, it is expressly provided that the action of an infant who resides in a foreign country and who has a guardian residing therein, may be brought by such guardian.

It was then not necessary for the infant defendants, William P. and Sophia Harrison, to be represented in this action by either a guardian ad litem or statutory guardian appointed and qualified in this State.

By reference to section 489 it will be perceived that there is no provision therein for the sale, by order of court, of the estate of an infant in real property except in an action brought against him either by a creditor or by his guardian, and hence it is necessary in every such action that the infant be brought before the court by service of summons, actual or constructive; and if the action be by his regular guardian, that a guardian ad litem defend for him.

But section 490 relates to the sale by order of a court of equity of only such real property as may be jointly owned by two or more persons, either of whom, it is expressly provided, may

bring an action therefor, though the plaintiff or defendant be an infant. And as under that section the guardian may unquestionably bring an action for his ward, and upon the conditions therein prescribed obtain an order of court for a sale of the joint property without making the ward a defendant, we see no reason why he may not as well in his answer adopt the statements of a petition already filed for the same purpose by another joint owner and unite with him in asking for a sale.

Whether the infant be a plaintiff suing by his guardian or be a defendant, no order of sale is authorized in an action brought under section 490 until it be shown to the satisfaction of the court, either that the share of each owner is worth less than \$100 or that the estate is in possession, and the property can not be divided without impairing its value or the value of the plaintiff's interest. And it would seem that if either of these conditions be shown to exist the defendant, though an infant, has no right to resist a sale of the property.

In our opinion, therefore, it is not indispensable that an infant defendant in such an action be served with summons, but the appearance and answer of his guardian is all that is required or was intended by the legislature.

It is not necessary to the validity of a sale made in pursuance of section 490, that before it is ordered by the court the guardian should execute the bond required by section 493. But it is provided in section 497 that in an action mentioned in subsection 2, section 490, the share of an infant shall not be paid by the purchaser, but remain a lien on the land, bearing interest until the infant become of age or until the guardian execute the bond. And the judgment rendered in this case is in substantial compliance with that provision of the Code.

We think it satisfactorily appears that the lot purchased by appellants could not have been divided without materially impairing its value, and the court did not err in ordering a sale of it or in overruling the exception for that reason.

Judgment affirmed.

Turner & Cunningham and Yeaman & Lockett for appellants.

Montgomery Merritt for appellees.

McGHEE v. SUTHERLAND.

(Filed June 15, 1886.)

1. Execution sales--Motion for possession—In a proceeding by notice under section 9, article 12, chapter 38 of the General Statutes by the purchaser to recover the possession of land sold under execution, it is not necessary that the notice should refer to the judgment or state that the land has not been redeemed or is not subject to redemption, or that the purchaser has obtained a conveyance from the sheriff. The act of March 23, 1882, amendatory of the statute, provides in express words the form of the notice to be given in such a case, and as the notice in this case followed that amendment it was sufficient.

2. Pleading—Exhibits—Although a writing upon which an action is founded be not filed, yet if the adverse party be duly summoned and fail to raise any question as to it he can not complain of the omission after judgment.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

This is a proceeding by notice under section 9, article 12, chapter 38 of the General Statutes by the purchaser to recover the possession of land sold under execution.

It provides that he may, after obtaining a conveyance and upon ten days' notice to the execution defendant, enter a motion upon the docket of the circuit court for the county in which the land lies for a judgment for the possession; and that the court shall award it if upon the hearing it appears that he is entitled to it, the proceedings to be the same as provided in chapter 6, title 10 of the Civil Code, relating to summary proceedings. The judgment in this case was rendered by default and the sufficiency of the notice is now in question.

It fails to refer to any judgment, nor does it state that the land had not been redeemed or was not subject to redemption, or that the purchaser had obtained a conveyance from the sheriff.

It was held in the cases of Bunnell, &c. v. Thompson, 12 Bush, 116, and Sharpe v. Roe, &c., 13 Bush, 461, that a judgment, based upon a notice which did not contain these averments, could not be sustained.

The chapter *supra* of the Code provided, however, that the notice should state the nature and grounds of the motion; and the decisions above cited were rendered prior to the act of March 23, 1882, amendatory of the statute upon which this proceeding is based, and which provides, in express words, the form of the notice to be given in such case. (Volume 1, page 49, Acts 1881.) It requires that the notice shall simply state that on a certain day the purchaser will enter a motion on the docket of the circuit court for a judgment for the possession of the lands (describing them) purchased by him under execution (giving the name of the plaintiff and the defendant in it with a reference to the execution book and the number of the execution).

The legislature had the right to, and have by this amendment prescribed, the mode of practice in such a case. It was intended to provide a plain and speedy remedy. The defendant has no ground of complaint, because he is not only informed by the notice that the purchaser will at a certain time ask the court to award him the possession by reason of his purchase, but it in substance says to him, if you are not satisfied, then, in order that you may be, you are referred to the execution through which I acquired my right.

It is manifest that the legislature did not intend that the purchaser, if he chose to adopt this mode of proceeding, should be held to greater particularity than would be required of him in an action of ejectment. In the latter case he would not be required to refer in his petition to the judgment, execution and sheriff's deed, through which he derives his right, but upon issue formed could exhibit them upon the trial.

It is true that section 120 of the Civil Code provides that if an action be founded upon a writing it must be filed as a part of the pleading or its absence explained; but if this be not done and the adverse party be duly summoned and fail to raise

any question as to it, he can not complain of it after judgment.

The notice in this case appears to have conformed to the statute as amended, the motion was entered upon the motion docket before the judgment was rendered, and it is affirmed.

H. M. Haskins, Jas. Stuart and Martin Yewell for appellant
W. N. & J. J. Sweeney for appellee.

KENTUCKY SUPERIOR COURT.

LICKING ROLLING MILL CO. v. FISCHER, &c.

(Filed February 17, 1886.)

1. Master and servant—If the wrongful act of a servant be committed in the course of his discharge of his master's business, and within the scope and limits of his employment, the fact that the act was willfully performed will not release the master from liability.

2. Trespass—Loss by fire—In an action to recover the value of property destroyed by fire, directly resulting from the defendant's wrongful act, the defendant can not escape liability upon the ground that it was not negligent in failing to foresee the injury, the action not being based upon negligence, but upon the wrongful act of the defendant.

3. "Act of God" signifies any inevitable accident occurring without the intervention of man, which no industry can avoid nor policy prevent. One can not provide the conditions of disaster, and then claim that it is the act of God.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bowden.

The appellant is a corporation. The appellees, as its lessees, were in possession of a lot on which were an elevator and some chutes and bins used by them in the coal business. The appellant had in its employment a bricklayer and a person to help him, who used unslacked lime in the business in which they were employed. This helper, without license from the appellees, took a barrel of lime from the appellant's premises, where it was to be used, and deposited it under one end of the chutes and bins, from which he got lime in small quantities as it was needed. About a month and a half after the barrel was placed there, some lime still remaining in it, the water of Licking river rose so high as to overflow the place where it was, slacked the lime and generated a heat which set fire to

the chutes and bins, which were thereby destroyed. The appellees had no notice that the lime was there; nor did any officer, agent or servant, except the bricklayer and his helper, have any intimation that it would be or had been put there. What induced the helper to put it there does not appear, but it is inferable that the object was to have it protected from falling rain; but whether the appellant had or did not have a shelter equally suitable and convenient does not appear. There was no evidence that the place where the lime was deposited was such as to suggest, even to a pessimist, the probability that the waters of the river would ever reach it, nor, on the other hand, that such an overflow was not to be feared by the most hopeful.

The court gave this instruction:

“If the jury believe from all the evidence that the defendant, the Licking River Rolling Mill Co., through its servants, while acting in the course of its employment, carelessly and negligently, and without the permission of the plaintiffs’ or either of them, placed unslacked lime upon the plaintiffs’ premises under their coal bins and chutes, and that the said coal bins and chutes were consumed by fire, and that it originated by the waters of Licking river rising on said unslacked lime and producing a heat which set fire to said coal bins and chutes, then they should find for plaintiffs such damages as they sustained thereby, not exceeding \$2,000, the amount claimed in the petition.”

1st. The appellant insists it is not, as master, liable for the trespass of its servant. There can be no doubt that the unlicensed act of placing the lime on the appellees’ premises was a trespass, whether the servant believed them to be the appellant’s premises or, knowing them not to be, willfully disregarded the rights of the appellees by placing the lime there, or did so not caring to know the facts. The instruction did not relate to an act which might be lawfully done to ascertain if it was unlawful by reason of the careless and negligent manner in which it was done, but to one which was unlawful by reason

of its being done without license. It could not have been intended to submit to the jury to say that an unlicensed use of another's premises was not a trespass unless the act of using was carelessly or negligently done, either in regard to the manner of doing it or in the absence of a willful and offensive purpose to commit a trespass. The jury were authorized to find for the plaintiff only on condition that the act constituting the trespass was the result of carelessness and negligence, and not of willful purpose.

The appellant ought not to complain of that limitation. If there had been evidence as there was in *Limpus v. General Omnibus Co.*, 1 Hurlst & C., 526, that the servant did the act willfully and for his own personal ends, that fact, otherwise supported, might have gone to the jury under the instruction as indicating a state of case in which the appellant was not liable. The instruction would have justified the argument suggested, but there was no evidence on which the argument could have taken hold. If there had been such evidence, and if the words "carelessly and negligently" had been omitted from the instruction, or the words "or willfully" had been added to them, the objection now made would have been properly presented.

But if it were conceded that the evidence would have sustained a finding that the act of the servant was willful, and that the instruction permitted a verdict for the plaintiffs on that finding, coupled with the other condition demanded by the instruction, that the act was done by the servant in performing the business he was employed to do, we think it was correct.

The rule is that if the act of the servant, although willful and wrongful, be committed in the course of his discharge of his master's business and within the scope and limits of his employment, the fact that the act was willfully performed will not release the master from liability. There is a very clear discussion of this matter by the editor of the *American Decisions*, in a note to *Ware v. R. & L. Canal Co.*, 15 La., 169, re-reported in volume 35, page 189. The rule that the willful

act of the servant is deemed a departure from the master's business, for which the latter is not liable, has been recognized and enforced by many courts of high authority; by some it is still maintained, but by others it has been given up as untenable. Judge Redfield (1 Red. Ry., section 103, subsection 2, note 6) supposes the rule is a misconception of *McManus v. Crickett*, 1 East., 106, which he supposes meant merely to hold that if the act of the servant was willful the master was not liable in the old action of trespass, but not to hold that he could not be made liable in an action on the case.

This view of the matter seems to have been taken by our Court of Appeals in *Johnson v. Castleman*, 2 Dana, 377. Castleman was part owner and was the master of a steamboat that ran against and sank a flat boat. The court, observing that the jury might have inferred that the injury was caused by the carelessness of the master or by the willful misconduct of the pilot, said: "When a servant in the actual employment of the master commits a willful trespass, without either the authority or implied assent of the master, the latter can not be made liable in trespass, but only in case."

Ferguson v. Terry, 1 Ben Monroe, 96, was an action of trespass, q. c. fr. Observing that the act may have been done by the servant while engaged in the master's business, but without his knowledge or consent, the court said that for such an act the master "can not be made responsible in trespass."

Brasher v. Kennedy, 10 Ben Monroe, 28, was an action against the owner of a ferry under a statute to recover the value of slaves taken across the river and thereby lost to plaintiff. The declaration alleged that the defendant willfully did the act; the fact was that he was not present and knew nothing about it, but that the slaves were set across by his servant, the ferryman. It was held that the declaration against the master for the act of his servant should not state it to have been committed willfully, but should show that it was committed negligently, and that if the conduct of the servant is alleged to have been willful the declaration will be insufficient. The

court cites *McManus v. Crickett*. But in that case there was no allegation that the servant did the act in the course of his employment, or that it was done by a servant at all, and while an action on the case against the master is maintainable on the ground of his negligence in having in his employment such a servant, and the negligent act of the servant might have been pleaded as if done by the master himself, and as if it had been his own personal negligence, a mere statement that the servant's act was willful shows no cause of action since it may not have been done in pursuit of the business entrusted to him. The case was correctly decided for these reasons, and, therefore, it is not necessary to consider it as in conflict with preceding utterances of the same court.

In *Robinson v. Webb*, 11 Bush, 482, it was said in argument that the master would be liable for injuries done by the willful and fraudulent act of the servant. The court did not use that language, but the facts considered could leave no doubt that the act in question was not only willful, but was done by the servant for his own personal advantage, but in the course of the business he was employed to do.

The rule which seems best sustained by reason and precedent is thus expressly recognized by some of our own cases, and is not in conflict with any of them. It accords with the enforced liability of carriers for the willful misconduct of their servants, though that liability may be sustained by considerations when the passenger complains, that do not well apply in ordinary cases when the injured parties are strangers. It was recognized by this court in *Matthews v. Cov. & Cin. Bridge Co.*, 4 Ky. Law Rep., 725, as a general proposition, though in that case the limits were not so narrow as here.

2d. So much of the answer as alleged that prior to the fire the defendant did not know or have any information that the combination of water and lime would produce fire was properly stricken out on the plaintiff's motion. A denial of knowledge or information that gun powder is explosive would have a face quite as serious.

3d. The defendant pleaded that "it did not know until after the said fires that the waters of Licking river would rise sufficiently to reach the space under or near said bins and chutes; that said waters had never before risen enough to reach said space; and that said inundation was the act of God and was wholly unanticipated by it." To this point of the answer a demurrer was sustained.

The act of God signifies any inevitable accident occurring without the intervention of men, which no industry can avoid nor policy prevent. (Broom's Legal Maxims, Actus Dei.) To invoke the protection of this maxim one must be without fault. He can not actively provide the conditions of a disaster and then claim that it is the act of God. Even neglect to do his duty will preclude him, as where one failed to repair a sea wall, which he should have done, and it was damaged by a great flood-tide. A lightning stroke is properly claimed as an act of God, but if one has wrongful possession of a horse which the lightning kills he can not escape liability; he wrongfully created the condition of the loss by having the horse when he was killed. So far, therefore, as the defendant sought to escape all responsibility on the ground that the flood in the river was the act of God, without regard to the question whether the loss was to be attributed to it alone as the nearest cause, we think the demurrer was properly sustained.

In another part of the answer the defendant had denied that its lime had been placed under the bins or chutes. The imputed trespass was thus put in issue. That was the only act alleged against the defendant. The other allegations were that the flood came up to the lime, generated the heat and set the bins and chutes afire. The answer denied that the fire was caused by heat, generated by the combination of water and lime. If all these issues had been found for the plaintiff there would have remained only the inquiry into the damages recoverable. If, as matter of law, it were held that a loss so produced is too remote a consequence of the act done by the defendant, if the lime was placed at a point where the flood

had never theretofore reached, we do not see why that evidence could not have been introduced without pleading the fact that it was so placed. Its effect was not to controvert any allegation of the petition, but merely to place a limit to recoverable damages. If the defendant had filed no answer, still an inquiry as to recoverable damages would have been necessary, and the plaintiff could not have had the right to any more than in the admitted facts the law would permit him to recover. If on that inquiry the plaintiff could not prove any damage which was the result of the admitted act of the defendant, he could recover nothing.

The plaintiffs rested their case on the alleged wrongful act of placing the lime on their premises, and did not, in order to show a loss for which they could recover, allege that it was placed where ordinary floods could reach it, nor did they allege that the flood was an ordinary one. When the right to recover is predicated on the defendant's act of negligence merely, and the negligent quality of that act depends on some other fact, that fact must be alleged in order to show negligence. As in this case, if the negligence had consisted in placing a thing where it would probably be overflowed, the fact that the water had overflowed the place should be averred. But this action is not based on any negligence of the defendant. It goes on the assumption that for a period of more than a month it had been wrongfully using the plaintiff's premises for the storage of unslacked lime; that that wrongful use existed at the time the fire occurred, and that the use, being wrongful, was also dangerous by reason of the fact that in the lime stored there lay the potential fire which would be fed by the touch of water, however it might be conveyed to it. The rising of the river was only one of the many ways in which the water might have come. A broken tank, on higher ground; a violent rain, its ordinary flow diverted by a casual plank or rock; a child, only to gratify its taste for the mysterious by seeing the smoke rise and hear the seething heat; one bent on mischief—any of these would or could have caused the same result. If the de-

fendant were chargeable with only negligence, it would be in a better position to claim exemption in regard to any injury it was not negligent to fail to foresee or anticipate; but that is not the case against it. The charge is that it wrongfully used the plaintiff's premises for the storage of unslacked lime, and that while this wrongful use continued the fire was generated by water flowing on the lime. The loss was the direct result of the wrongful act. If the water had come there by any of the means suggested, or by whatever means, the defendant would not have been permitted to escape by reason of the other concurring act. A wrongdoer may not apportion his wrongful act, especially when the loss resulting actually happens while his wrongful act is in force and operation. (Sedg. Dam., 89.)

Nevertheless the judgment must be reversed. The plaintiffs alleged that they held the premises as lessees of the defendant; that their predecessors had erected some of the chutes and bins, and that they had erected some. It is not alleged how many they erected, nor that they had acquired the right of their predecessors in the bins and chutes erected by them, nor that they or their predecessors had any right, except that of lessees, nor how long the term had yet to run. It is alleged that the chutes and bins were attached to an elevator on the premises, but it is not alleged that they were moveables or that the plaintiffs were the owners of them. It may be guessed from the rejected counterclaim that the terms of the lease were such that the chutes and bins were the property of the plaintiffs, but it would be mere inference and possibly an incorrect one. It is quite clear that the recovery was for the full value of all of the chutes and bins destroyed.

The judgment is reversed and the case remanded, with directions to grant the appellant a new trial. Leave, if asked in a reasonable time, should be granted to amend the pleadings.

Hallam & Myers for appellant.

Cleary, Hamilton & Cleary for appellees.

FAMAN v. LEXINGTON ICE MFG. & STORAGE CO.

(Filed March 24, 1886.)

Verdict—Power of court to alter—After a jury has been discharged its verdict can not be altered by the court and judgment rendered accordingly, no matter through what channel the court has ascertained that the jury intended to make a verdict different from the one returned.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Richards.

The jury in this case were required to return only a special verdict. Two questions were submitted to them—the first they answered in the negative, the second in the affirmative. The plaintiff moved for a judgment, and as the verdict stood he would have been entitled to it, but the defendant intervened with a motion to correct the verdict on the ground that the jury intended to answer the second question in the negative also, and had returned an affirmative answer through mistake.

Both of these motions were made immediately after the verdict was returned, but after the jury had been discharged, though the greater portion of them, if not all, were still in the room. The court promptly overruled the motion to correct the verdict. On the next day this motion was renewed and the affidavits of the jurymen filed in support of it. Thereupon the court corrected the verdict by changing the answer from the affirmative to the negative, and rendered a judgment for the defendant upon the verdict as altered.

In an ordinary action, where the rights of the parties depend upon facts in issue, a judgment can only be rendered upon the verdict of a jury, if one be empaneled. Where the evidence justifies it the court may order them to find a particular way, but still it must be the verdict of the jury. If they refuse to obey the order the court may discharge them, but has no power to enter up the verdict for them.

The verdict must be in writing, signed by the foreman and read by the clerk to the jury, and the inquiry made whether or not it is their verdict. If it is not in writing and signed, or

if any of them answer in the negative, the verdict can not be received. But where the statute has been complied with in these respects there are but few cases in which the affidavit of a jurymen could be read to destroy its validity.

We need not stop to inquire what those cases are, for whenever the right to so attack the verdict exists, if successful, the result must be a new trial. No matter through what channel the court has ascertained that the jury intended to make a verdict different from the one returned, it has no power to correct the mistake and enter a judgment accordingly. Under proper circumstances the jury might be recalled and allowed themselves to correct the verdict, or the court might grant a new trial, but whenever the judgment is entered it must be upon the verdict of the jury as signed and returned by them. If the judge makes the correction, though it is admitted to be then as they intended, yet that intention has never been manifested by the writing, signed by the foreman, nor have they ever been asked by the clerk, while assembled as a jury, whether the verdict as corrected was theirs. It is not sufficient that the verdict would have been different had the mistake not occurred. The appellee had no right to a judgment except upon the jury's verdict. The mistake was its misfortune. Although the court may have had the power to partially protect appellee from its consequences by refusing to render a judgment for the other side, there was no authority for altering the verdict for the purpose of rendering a judgment in appellee's favor. (*Nave v. Collier*, 6 Ky. Law Rep., 602.) Under the old English system the court's power over the jury and its verdict was greater than exists under ours, yet we know of no case in England where the court has gone to the extent here contended for. The remarks of Lord Mansfield in *Cogen v. Ebelin*, 1 Burr., 383, were premature and not entered as a decision of the case.

The decisions under the New York Code have been more liberal in this respect than any in this country, but there is a distinction between the statutory provisions of that State and

this. Yet the most extreme decision in that State (*Dalrymple v. Williams*, 63 N. Y., 361) is not sufficient for appellee's purposes. The action was against two defendants, and the jury determined to find against one and in favor of the other, and so directed their foreman to report, but he, through inadvertence, orally announced a general verdict against both. The jurymen were allowed to testify that the foreman had not reported the verdict they had directed. Judge Folger objected to going even this far, and dissented. But here the jury returned a written verdict prepared and signed in the jury room, which was read to them by the clerk and assented to by them.

The complaint is not that they did not know the question had been answered in the affirmative, but that they did not understand the effect of the question, and, therefore, answered it in the affirmative when they should have answered it in the negative to have produced the result they intended. The court said, in *Dalrymple v. Williams*, "there are reasons of public policy why jurors should not be heard to impeach their verdicts, whether by showing their mistakes or misconduct. Neither can they properly be permitted to declare, with a view to correct them, an intent different from that actually expressed by the verdict as rendered in open court. * * * This rule excludes affidavits to show mistake or error of the jurors in respect to the merits or irregularity or misconduct, or that they mistook the effect of their verdict and intended something different." (63 N. Y., 363.)

The general principles announced in that case accord with our views, and the particular question there decided could never arise under our Code. In New York a general verdict is not required to be in writing. When the jury have arrived at a conclusion the foreman reports it to the clerk of the court to be recorded. It was there held by a divided court that if the foreman reports, through inadvertence, the verdict to be for the plaintiff when he had been directed to report it for the defendant, the affidavits of the jury might be read to correct it.

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But in Kentucky all verdicts must be in writing, and it would be a dangerous practice to permit the jury, after being discharged, to establish a verdict by affidavit different from the writing. But even if the second question had been answered in the negative the findings would not then have been sufficient to support the judgment for \$1,000 the court has rendered in favor of the defendant upon its counterclaim.

The plaintiff sued for \$2,000, less a credit of \$1,000, for machinery erected for and delivered to the defendant. The answer was in three paragraphs: The first set up the plaintiff's warranty that the machinery would do a certain amount of work, and alleged that it would not accomplish that amount, and, therefore, the plaintiff ought not to recover; the second stated the machinery was not worth over \$1,000, which amount defendant had already paid; the third pleaded a counterclaim for \$1,000 for damages occasioned by the machinery not accomplishing the amount of work contracted for. The first paragraph was replied to by stating that the machinery could perform the work contracted for, and if it had not done so it was the defendant's fault; the second, by stating that the defendant had retained and was still using the machinery, which was in fact worth more than \$2,000; the third, by stating that no damage had been occasioned by plaintiff as the diminished work of the machinery was the defendant's fault. Issue was joined upon these matters. After this an amended answer was filed alleging simply that the \$1,000 had been paid "without consideration," and praying judgment therefor. This amendment did not change the issues as the original answer admitted the machinery, which defendant still retained and used, was worth \$1,000.

These being the issues the court only asked the jury whether the machinery did the amount of work guaranteed, and if it did not, whether it was the defendant's fault. If both questions had been answered in the negative no fact would thereby have been determined that would have authorized a judgment in defendant's favor upon its counterclaim, yet the court has

given it a judgment for \$1,000. This was erroneous, whether intended for the \$1,000 paid on account of the machinery or for the damages for the alleged breach. The defendant could not recover the \$1,000 paid while retaining the machinery, admitted to be worth that amount, nor could a judgment for \$1,000 damages be sustained, since there was nothing in the verdict to support it, even after it was altered.

Wherefore, the judgment is reversed and the cause remanded for a new trial.

T. N. Allen for appellant.

D. G. Falconer and Bronston & Kinkead for appellees.

THE AMERICAN MUTUAL AID SOCIETY v. QUIRE, &c.

(Filed March 31, 1886.)

1. Insurance—Forfeiture—The provision in the charter of a Mutual Aid Society that “any member failing to pay his annual due or assessment within thirty days after notice has been served on him or sent to him shall forfeit his membership and all benefits arising therefrom,” is not self-executing, and the society may waive the forfeiture.

In this case the society waived the forfeiture by sending the member notice of assessments made more than thirty days after he was in default.

2. Notice of assessment—Although the charter provides for a forfeiture where the member has failed to pay within thirty days after notice has been “served on him or sent to him,” the time does not begin to run until he has had actual notice. An allegation by the defendant that “it sent him notice” on a certain day, and that “he received the same,” does not allege the time at which he received the notice, and is, therefore, not sufficient to show that there was a forfeiture.

3. Jurisdiction—Pleading—In order to deprive a court of general jurisdiction of its jurisdiction in the particular case the answer must state facts which exclude it by showing that the action is local unless the petition shows on its face that the court has no jurisdiction.

In an action against an insurance company, brought in Franklin county, the allegations of the answer that the principal office and place of business of the defendant “is situated” in Jefferson county, and that the person upon whom the summons was served “is not” an agent of the defendant, are not sufficient to support the denial of jurisdiction, as both refer to the time when the answer was filed.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bowden.

This was an action by the appellees as beneficiaries under a certificate of membership held by John R. Quire.

The action was brought in the Franklin Circuit Court, and the summons, issued to that county, was returned "executed on the American Mutual Aid Society by delivering to W. T. Reading, their agent at Frankfort, Ky., a copy of the within summons."

The defendant, by answer, denied that the court had jurisdiction, alleging that "its principal office and place of business is situated in Louisville, Jefferson county, Ky., and that W. T. Reading, the person upon whom the summons was served in this case, is not an agent of the defendant, and has no authority to do anything for said defendant except to receive assessments and dues." To this answer a demurrer was sustained.

By section 71 of the Code it is provided "that an action against an insurance company may be brought in the county in which its principal office or place of business is situated, or, if it arise out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place."

The Franklin Circuit Court had jurisdiction of the subject-matter, and it was not necessary that the petition should show that it had jurisdiction of the defendant, or to negative the existence of facts which, under the Code, would make the jurisdiction local. Unless the petition shows on its face that the court has not jurisdiction the facts which deprive it of jurisdiction must be presented in an answer. (*Baker v. L. & N. R. R. Co.*, 4 Bush, 619.) The rule is different where the court has no jurisdiction of the class of subjects to which the particular case belongs, unless certain essential and indispensable facts exist. (*Jacobs' Adm'r v. L. & N. R. R. Co.*, 10 Bush, 269.) In order to deprive a court of general jurisdiction of its jurisdiction in the particular case the answer must state facts which exclude it by showing that the action is local.

The answer states that the defendant's principal office and place of business was in Jefferson county, where the answer was filed, but does not allege where it was when the action was commenced. It did not allege that the cause of action arose out of a transaction with an officer or agent elsewhere than in Franklin county. The reference to Reading is irrelevant because it merely declares that he is not an agent except for certain purposes, and has no authority except for those purposes. What authority he had when the answer was filed was immaterial. In determining the county in which the action could be brought the question related to the time when the transaction took place, out of which the cause of action arose and the county in which it took place. In determining whether the service of the summons on Reading was a service on the defendant, the question related to the time when it was served. The allegation relates to neither. It may be that Reading had no connection with the defendant when the transaction occurred, and yet every part of it, from first to last, may have occurred in Franklin county. It may be that when the summons was served Reading was an agent with general powers.

The answer does not controvert or question the officer's return. It is not averred that Reading was not then its agent or that there was then any other agent in Franklin county. There was no motion to quash the summons nor was there any equivalent motion.

In its original answer the society resisted recovery on the ground that Quire had forfeited his membership and all rights pertaining to it by failing to pay assessments as follows: One for \$2.30, made October 1, 1883; one for \$2.30, made November 1, 1883, one for \$3.45, made December 1, 1883. It alleged that it sent notice of the October assessment to Quire October 1, 1883, and that he received it. In regard to the assessments made November 1 and December 1 it alleged that Quire was duly notified, but at what time notices were sent is not alleged. Seeing that he could have forfeited his membership but once, it is alleged to have resulted from the failure to pay the assess-

ment made October 1 within thirty days after notice that it had been made. It then alleges that by section 11 of its charter "it had the right, if it chose so to do, for thirty days after said forfeiture, through its president, to receive all arrearages from any member so failing to pay their assessments, and it gave the above-described notices of assessments of November 1 and December 1, they both falling within the thirty days next after said forfeiture." The defense thus presented was that, having had notice of an assessment made October 1 and having failed for thirty days after notice to pay that assessment, Quire forfeited his right, and no claim of forfeiture is predicated on the failure to pay the assessments of November 1 and December 1, which were made merely as affording Quire a chance to pay them and to be reinstated. It is not averred when Quire received notice of any of these assessments; the allegation that "it sent him notice" of the assessment made October 1, on that day, and that "he received the same," does not allege the time at which he received the notice.

In the amended answer it is alleged that the assessments alleged to have been made October 1 and December 1 were made January 1, 1884. The exact language is "that the assessment referred to in the answer as having been made on the 1st day of October, 1883, for deaths occurring prior thereto, and the assessment alleged in said answer to have been made on December 1, 1883, for deaths occurring prior thereto, and the assessment alleged to have been made on December 1, 1883, was made on January 1, 1884." It may be the first "December" should have been "November." The averment then follows that "it gave to defendant notice of the above assessments, and he failed to pay the same." As no assessment was made October 1 no notice of it could have been then sent, and it is only in reference to that notice there is any averment that there was a failure for thirty days after notice to pay. The amended answer withdraws that allegation by stating a case that excludes it, but it enlarges the answer by the statement that the assessment of January 1, 1884, was for the three sums of \$2.80, \$2.80 and \$3.45, and that the forfeiting act of mis-

sion was to pay these sums then assessed, but it is not averred when Quire received notice of this assessment. There can be no forfeiture under the charter unless the member fails to pay within thirty days "after notice had been served upon him or sent to him;" the time does not begin to run till he has had actual notice. So far as appears from the answer Quire may not have had such notice till the day he died. The defendant's answer, therefore, presented no defense to the action. But even if the answer can be regarded as alleging a failure to pay the assessments within thirty days after having received actual notice of them, the judgment is, in our opinion, correct.

If the fatal omission was to pay the assessment of October 1, 1883, as alleged in the original answer, and if Quire had notice the same day, he forfeited nothing till November 1, and at that date, on the defendant's theory, he ceased to be a member. If we take the amended answer there was no such assessment made in either October, November or December, but the assessments that belonged to those months were all made January 1, 1884. In that case Quire lost his membership, according to that theory, by February 1, if he received notice thirty days before that day. The difference between the two cases is one of no importance. If Quire's default was November 1, 1883, the time within which he was afterwards treated as a member was longer than if the default was not till February 1, but in neither case was he liable to be assessed after he had ceased to be a member. Yet he was assessed \$3.45 February 1, and \$4.60 March 1, and payment was demanded. So that it appears that the society treated him as a member, assessed him as such, and demanded payment of him as such in February and March, when he was not a member of the society according to its present version of section 11 of its charter. That section provides that "any member failing to pay his annual due or assessment within thirty days after notice has been served on him or sent him shall forfeit his membership and all benefits arising therefrom." This provision is printed

on each notice of an assessment. The fact that Quire had not paid his assessments was necessarily known to the society, and the act of sending notice to him afterwards, with this provision printed on it, was actual notice to him that the society elected to waive the forfeiture. It said: "You are in arrear, and we could forfeit your rights as a member under the provision quoted, but we choose not to do so; and now, conceding to you all rights as a member notwithstanding you are in arrear, we call on you to discharge the duty of a member by paying assessments made on members only, and made more than thirty days after you were in default."

Not only did these notices necessarily imply a waiver of the forfeiture, but it is manifest it was the purpose of the society, acting through its board of assessment, to do so. Their books showed who retained their membership and who had ceased to be members by reason of forfeiture. They did not regard a mere failure to pay as operating a forfeiture by its own force, because they assessed Quire more than thirty days after his failure, and while the books showed he had made no payments since October 1. What entry is made on the books showing the secretary's purpose to enforce the forfeiture does not appear, but it certainly was not the mere blank space where the credit ought to have been entered. The general manager did not mean that when he said "the books show themselves when a man is dropped." The notices show they had not "dropped" Quire.

The local agent, Reading, so understood it. He told many persons he would not "drop" them without notice. How could that be if a mere failure to pay dropped the member as matter of law? It shows that something was to be done by the society to enforce the forfeiture, and before that should be done Reading promised to give notice so the persons could prevent the doing of that efficient act.

The society itself so understood it. The procurement of the amendment of February 7, 1884, presupposes and concedes

that section 11 did not provide for a self-executing forfeiture, then obtained by that amendment.

That amendment was not in force when the February assessment was made and does not affect it, perhaps; but it was in force when the March assessment was made, and a mere failure to pay it within thirty days after notice given would probably have resulted in a forfeiture; but notice was not given till March 18, and Quire died April 11, in less than thirty days after he had notice. But the failure to pay neither the February nor the March assessment was in issue. The society rested its defense on the failure to pay the October assessment, as stated by the original answer, and on the failure to pay the aggregate assessment of January 1, 1884, according to the amended answer.

The instruction, therefore, in regard to this matter was more favorable to the defendant than the pleadings justified.

The clause of forfeiture in this charter is similar to that considered in *Johnson v. The Southern Mutual Life Insurance Co.*, 79 Ky., 404, which was held not to be self-executing, but one the company could waive. Such right to forfeit is for the benefit of the company and may be asserted against the will of the member, but the company may forego the right to declare the forfeiture, and may content itself with such rights as, under the circumstances, it may have against the member as such. If it does so, preferring to retain the member and its remedies against him as such, it can not, when death comes, dispute the relation which it has thus elected to continue, and do, after the member is dead, what it might have done at the time of default. It is altogether a different question when, as in *McDonald, Receiver v. Ross*, 36 N. Y., 87, the member has, by a provision of the charter, the right to withdraw, and on being sued he defends on the ground that he had exercised that right. In that case it was held, on the peculiar language of the charter, of the by-laws and of the certificate, that a failure to pay, giving the company the right to forfeit, should be taken as the member's act of withdrawal. But there is

nothing in the charter of the appellant, any more than there was in that considered in Johnson's case cited, that will permit the legal conclusion that the failure to pay "is equivalent to a formal withdrawal or resignation at the expiration of thirty days next after notice to pay an assessment." Whether that conclusion was correct, as matter of fact, was submitted to the jury with other evidence relating to Quire's intention to withdraw.

If, as the appellant insists, Quire had the right to withdraw whenever he pleased, though the society did not consent, but refused to consent, there is no ground for complaint, because the court submitted that matter to the jury, instructing them that there could be no recovery if Quire had withdrawn from the society. It was a proper limitation on this instruction, in whatever light it can be considered, to say that, if Quire had lost his mind, rights of the beneficiaries could not be affected by his declarations. Withdrawal is an intelligent act. Whether Quire was insane or not, and whatever may have caused his failure to pay, the society could enforce the forfeiture; but if it relies on his own voluntary act it can not escape if he was mentally incapable of an intelligent act.

The judgment is affirmed, with damages.

J. W. Rodman for appellant.

Wm. Lindsay for appellee.

TEETER v. ANDERSON, &c.

(Filed February 10, 1886.)

1. Decedent's estate—Action against heir—Affidavit and demand—To enable the creditor of a decedent to sue the heir it is not necessary that he should make demand of the heir before suit, but he must make demand of the personal representative, accompanied with the required affidavit, unless there be no personal representative, or he be a nonresident, or has been absent from the State four months, and if the demand can not be made the plaintiff must still make the affidavit before suit is brought. For the failure to make the affidavit, however, the petition should not be dismissed absolutely, but without prejudice.

2. Limitation—Pleading—Where the plaintiff alleges in his petition certain facts with, the view of bringing the cause of action within the savings of the statute of limitation, although the facts stated be not sufficient for

that purpose, the petition is not necessarily bad on demurrer as it may be that other savings can be shown by way of reply.

3. Trustees—Adverse holding—Where a trustee for the benefit of creditors was directed by order of court to pay to the wife of the debtor out of the proceeds of the husband's land a certain sum as her contingent right of dower, limitation did not begin to run in favor of the trustee against the wife until the money out of which the payment was to be made was collected by the trustee and there was a demand and refusal to pay, or some act done of which the plaintiff had notice, showing that the holding of the trustee was adverse.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Ward.

In *Johnson v. Belt*, 4 Bush, 405, the claim against the estate of the decedent had been verified as required by the statute, but there had been no demand before the institution of the suit against the heirs. It was there held that a demand was not necessary before instituting a suit against the heirs.

It seems that the statute has been changed essentially since it was so construed. The statute then and now required "all claims against the estate of a decedent to be verified by written affidavit." The Code then provided: "No suit shall be brought against a personal representative until after a demand is made of him, accompanied with the affidavit required." (Section 473 of Code of 1854.)

The statute now is:

"Before such affidavit is made no action shall be brought or recovery had on any such demand, nor until demand of payment thereof has been made of the personal representative, accompanied by affidavit of its justice." (Section 37, article 2 of chapter 39, General Statutes.)

Section 437 of the Code of 1877 adopts this section of the statute, and adds the further provision that the demand need not be made if the personal representative be a nonresident of this State or shall have been absent therefrom four months.

The provisions as to the affidavit to be made in support of claims against the estate of decedents was, under the Revised Statutes, as now under the General Statutes, found in the chapter which treats of executors and administrators, but that

provision was, by construction in the case of *Johnson v. Belt*, *supra*, applied to actions against the heir, but holding that no demand was necessary in that case because the Code restricted its application to cases in which the personal representative was sued. So it was not from the location of the provision in the statute or the subject-matter of the connection which controlled the court, but the letter of the statute. The letter of the statute is changed, and it is now provided that "no action shall be brought or recovery had on any such demand, nor until demand," etc. We, therefore, conclude that the affidavit and demand upon the personal representative must be made before the heir or representative is sued, unless there is no personal representative, or, if one, that he is a nonresident, or has been absent from the State four months. In either of these cases no demand need be made, as there is no provision that a demand shall be made upon the heir, but the affidavit must be made whether the demand provided for can or can not be made. In this case there was no personal representative; the allegation is that he had settled the estate and his accounts, and paid the balance in his hands to the heirs and was discharged, and for this reason the demand could not be made, but the affidavit could and ought to have been made before the suit was instituted.

But this failure did not justify the judgment dismissing the petition absolutely if that was all, the dismissal ought to have been without prejudice.

It is insisted that the judgment is correct, because the claim is barred by the statute of limitation. There had been a demurrer to the petition and amended petition sustained as to the former, not acted upon as to the latter before answer, which, among other defenses, relied upon the statute of limitation. To this there was a demurrer, which was overruled, but the court, after considering that, sustained the demurrer to the petition as amended, evidently on the ground that the claim was barred by the statute.

We know of no case in this State wherein it has ever been held that the statute of limitation could be successfully relied upon as a defense by way of demurrer to the petition. Whether a petition could be so framed as to fall within the reasoning of the court in the cases of *Chiles v. Drake*, 2 Met., 147, and *Rankin v. Turney*, 2 Bush, 556, we need not determine. It is true that the petition in this case alleged certain facts with the view of bringing the cause of action within the savings of the statute, but this the plaintiff was not bound to do, and even though it was admitted that these were not sufficient, a matter we can not at present decide, and do not decide for reasons hereinafter stated, it does not appear that other savings might not have been shown by way of reply. (*Board v. Jolly*, 5 Bush, 86.)

But the petition does not state the time when appellant's cause of action accrued, except that it accrued at sometime before the death of the ancestor of appellees.

The ancestor of appellees was the trustee of appellant's husband. He had in his hands, under a deed of trust, the property of appellant's husband to pay the husband's debts. Suits had been instituted to settle the trust estate and the trust property had been sold. To this suit appellant was made a party, and the allegations are that in May, 1856, an order was made directing the trustee to pay to plaintiff for her contingent right of dower in the lands of her husband \$1,600—out of the second payment for the land, when collected, less \$50, to be paid to her attorney; that the trustee had collected the second land payment, had refused to pay the plaintiff, and had converted that sum to his own use. It is not alleged when the trustee collected the sum out of which the payment was to be made, nor when he refused to pay plaintiff, nor when he converted the trust property to his own use, or diverted it from the object and directions given to it by the order of court in adjudging it to the plaintiff. These things were done during the lifetime of the trustee, but when is not alleged. Until the money was collected out of which plaintiff was to be paid she

had no cause of action, and as the trustee held the fund after it was collected in execution of an express trust, his holding is presumed to be amicable, and not adverse, until there was a demand and refusal to pay, or some act done of which this plaintiff had notice, showing that his holding was adverse; and until there was an adverse holding the statute would not begin to run.

From the allegations of the petition the claim was not barred, therefore, no necessity to show that the claim was within the savings of the statute.

But for the reason indicated the judgment must be reversed, with directions to dismiss the petition without prejudice.

Denny & Tomlinson for appellant.

H. C. Kauffman, Anderson & Henderson and J. W. Alcorn for appellees.

HIGGINS AND WIFE v. THE TOWN OF CRAB ORCHARD.

(Filed March 19, 1886.)

Towns and cities—Injuries by mobs—To make a municipal corporation liable under the statute which provides that “any city of this Commonwealth” shall be liable for injuries to property done by mobs under certain circumstances, it is not necessary that it should be designated as a “city” by its charter; the statute applies to every incorporated town having by its charter such police power that it could have prevented the injury.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Bowden.

By section 5 of chapter 1 of the General Statutes “any city of this Commonwealth” is made liable for injuries to property done by mobs under certain circumstances. The only question here is whether the town of Crab Orchard is to be considered a city within the meaning of the statute. There is no liability except by force of the statute. (Prather v. City of Lexington, 13 B. Mon., 559; Ward v. City of Louisville, 16 B. Mon., 184.)

In England and in several of our States there are general acts respecting municipal corporations, wherein they are classi-

fied as cities, towns and villages; but there is no such statute in Kentucky. It is obviously beyond the judicial right to adopt such an arbitrary classification as depends on the territorial extent, population, or commercial importance of the place. Up to exactly what number of people is the place a town, and beyond which is it a city? The other elements of the test proposed are equally incapable of being applied. If the many charters granted by the legislature indicated any line of discrimination that could be traced even with difficulty, it might be said that those are cities which are so called in their charters, and that those are towns which in their charters are called towns. But a casual examination of these incorporating acts will show that there has been no purpose to confer a distinct legal character by this mode of designation. Many places incorporated as towns are much more considerable in population, territorial extent, wealth and business than many others incorporated as cities. The words have clearly not been employed as classifying terms. To adopt them for the purpose of construing the statute considered would result in subjecting to liability many places with small populations, and exempting many others more populous and in every way more important. We do not think the legislature meant to punish in that way the vanity of a village which has itself called a city.

Nor has there been any uniformity in the constitution of the legislative, executive and judicial bodies in these corporations. As a rule, perhaps, the smaller places are called towns, and have trustees for their legislature, a chairman for their executive, and a police judge or the resident justice for their judiciary. Some places called cities have a board of trustees and a chairman; many have a mayor and a council; and some a mayor, a council and a board of aldermen.

Bouvier (Law Dictionary) says a city is "an incorporated town or borough which is or has been the see of a bishop." This definition has no value here, as there can be no such city as it defines. The Britannica says that while Coke and Blackstone define as Bouvier does, the word is used in England with con-

siderable laxity, and notes that "Westminster is called a city, though it has no corporation; and Thetford, Sherbourne and Dorchester are never so designated, though they are regularly incorporated, and were once episcopal sees." Johnson's Cyclopædia says a city "is a large town—an incorporated town." The New American Cyclopædia says that in the United States a city "is largely distinguished from a town by having a corporate government." Webster is to the same effect: "First, in a general sense, a large town; second, in a more appropriate sense, a corporate town, governed by particular officers."

It seems reasonable to assume that in every act of incorporation the legislature confers such powers and facilities as are supposed to be required by the people of the place incorporated; and that, therefore, the police power of all cities and towns will be relatively equal, or approximately so. If it is decided as a matter of legislative policy that "any" city shall be liable for injuries to property which the police power of the city, including the posse civitatis, could have prevented, it seems difficult to find a reason why every incorporated town, having similar preventing police power, should not be held to a similar responsibility. It is not the name which determines the duty to protect. It seems immaterial whether the legislature is called council or trustees, or whether it consists of two bodies or of one only; or whether the chief executive is called a mayor or a chairman; in either case the power depends on the provisions of the charter; and it is clear, beyond question, that if it is admitted that the municipality is a city its locality does not depend on the nature or extent of the powers conferred by the charter, if its power was in point of fact such that it could have prevented the injury.

It is conceded that if the appellee is a city within the meaning of the statute the petition is good. Our opinion is that it is a city such as the statute contemplated.

The judgment is reversed and the case is remanded, with instructions to overrule the demurrer to the petition and for further proceedings.

Welch & Sauley for appellant.

Hill & Alcorn for appellee.

NEWPORT & MAYSVILLE R. R. CO. v. HAY.

(Filed March 17, 1886.)

1. Corporations—Preliminary organization—Compensation of officers—One who rendered services in securing subscriptions to the capital stock of a railroad corporation, merely for the purpose of organizing, and acted as secretary and treasurer of the organization kept up for the purpose of keeping the grant alive, there being no bona fide organization for the purpose of building the road, while he may have a claim against those with whom he acted, has no claim against the new company organized by those who subsequently purchased the stock for a valuable consideration without any notice from the corporate books or otherwise that such nominal officers would assert a claim for past services.

2. Compensation of permanent officers—The president and directors of a corporation can not claim compensation for their services, having accepted and filled their positions without any provision therefor. This rule, however, does apply to a mere ministerial officer like the secretary, who is entitled to compensation unless his services have been rendered under an agreement not to charge therefor, or under such circumstances as would imply that they were gratuitous.

3. Limitation—Written Contract—Minutes of corporation—The minutes of a corporation showing the election of a secretary by the board of directors is not a written contract within the meaning of the statute of limitations, and an action by the secretary for a reasonable compensation for services rendered is barred in five years after the close of each year's service.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Richards.

The Newport & Maysville Railroad Co. was chartered in 1856. In 1876 appellee, acting under authority of commissioners appointed for that purpose, opened a book at his office, he being then engaged in other business, to receive subscriptions for stock. On November 28 and December 19, 1876, ten persons signed this book as stockholders merely for the purpose of organizing, the amounts set opposite their names never in fact having been paid. On December 27 the stockholders met and elected directors, who immediately organized by electing a president, a secretary and treasurer. Similar meetings were had annually till 1881, which appears to have been simply for the purpose of keeping up the organization, nothing having been done towards the actual construction of the railroad. In

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1881 Huntington and his associates purchased the rights of those formerly interested in the corporation, and elected new directors and new officers. On the 21st day of May, 1884, the appellee instituted this action against the corporation to recover \$3,500 for services as secretary and treasurer from 1876 to June 2, 1881, and \$500 for receiving the aforesaid subscriptions to the capital stock. The jury returned the following verdict: "We, the jury, find for the plaintiff, first, for receiving subscriptions, one hundred dollars (\$100); second, for services as secretary, one hundred and fifty dollars (\$150) per year for five years, amounting to \$750, making total amount \$850, which we find for plaintiff." This appeal is prosecuted from a judgment for the \$850.

Persons who interest themselves in getting up a corporation must be presumed to be acting for their own special benefit, for they can not be considered as acting in behalf of a corporation that has no existence. It is time enough for such corporate bodies to incur liabilities, by which property purchased with the money of stockholders is to be encumbered, after they have been regularly organized under their charters and selected officers to conduct their affairs.

The appellant company could have no existence except as the result of an organization effected by the bona fide stockholders. It is, therefore, impossible that the services rendered in inducing persons to become subscribers for the purpose of organizing could have been rendered at the request of the company subsequently created. (*New York & N. H. R. R. Co. v. Ketchum*, 27 Conn., 170.) As said by the court in that case: "We are aware that it is no uncommon practice for corporations to assume and pay these preliminary and antecedent charges after the company has become organized, but we do not see how the company, if it should object, could be compelled to pay them, and in some cases it would be most inequitable to require it."

The court should not have allowed the matters embraced in the second paragraph of the petition to have gone to the jury.

The president and directors of a corporation are trustees for the shareholders, and have no power to waste, destroy, misapply, or give away the funds or other property entrusted to their keeping. Having accepted and filled their positions without any provision having been made for their compensation, the stockholders have the right to suppose that they are acting under the common law rule by which trustees can not claim compensation for their services. (Gridley v. The Lafayette, B. & M. Ry. Co., 71 Ills., 200; Kirkpatrick v. The Penrose Ferry Bridge Co., 49 Penn. St., 121; N. Y. & N. H. R. R. Co. v. Ketchum, 27 Conn., 170; Henry v. R. & B. R. R. Co., 27 Vt., 435; Butts v. Woods, 37 N. Y., 317; Holder v. Laf., B. & M. Ry. Co., 71 Ills., 106.)

This healthy doctrine, which is based upon the relation of trustee and cestuis que trust existing between the parties, should not be extended to any officer or agent with whom the relation does not exist. A mere ministerial officer, like the secretary, who has no voice in the management of the corporation's property, does not come within the rule, although some courts, through inadvertance, have held the contrary. The doctrine should only be applied to those who have the disposal of the property, and may be tempted to misapply the funds for their personal benefit. (Holder v. Laf., B. & M. Ry. Co., 71 Ills., 106.)

But the mere fact that a secretary has been appointed and discharged the duties of his office does not conclusively determine his right to recover compensation. The services may have been rendered under an agreement not to charge therefor, or under such circumstances as would imply that they were gratuitous; in either event no recovery should be had against the company.

In the case at bar there was no express contract that there should or should not be compensation, but there was testimony conducing to prove the services were rendered as a gratuity. One witness testified that the plaintiff told him he had accepted the position at the request of Mr. Gaither, under whom

he was employed in other pursuits, and did not intend to make any charge for his services. Nor did he make any demand for pay at any time during the period the corporation was managed by Mr. Gaither and his associates; it was not until three years after the charter had passed under the control of other parties that his claim was presented. Moreover, it does not appear that at any time during the period of his service the corporation ever really entered upon the business for which it was chartered, and the subscriptions for stock were merely nominal.

If during this period there never was any bona fide organization for the purpose of building the road the plaintiff might have a claim against those with whom he acted in keeping the grant alive; but as to those who subsequently purchased the stock for a valuable consideration, without any notice from the corporate books or otherwise that such nominal officers would assert a claim for past salaries, no liability would devolve upon the new organization.

The instructions given by the court were inconsistent with these views, and erroneous.

The minutes of a corporation showing the election of a secretary by the board of directors is not a written contract within the meaning of the statute of limitation; and an action for a reasonable compensation for services rendered thereunder would be barred in five years after the close of each year's service. (*Frayler v. S. M. Co.*, 17 California, 594.) The verdict being in the nature of a special finding, it was the duty of the court to render only such judgment thereon as the law authorized. In no aspect of the case, therefore, could a judgment have been sustained for any services rendered prior to 1879, the statute of limitation having been pleaded.

Judgment reversed and the cause remanded for further proceedings.

Hallam & Myers and J. C. Wright for appellant.

C. L. Raison, Jr., for appellee.

THE AMERICAN FIRE INS. CO. OF PHILADELPHIA v.
NUGENT.

(Filed February 3, 1886.)

1. Insurance—Misrepresentation as to occupancy—Where the character of the occupancy of a building insured against fire is fully explained to the agent authorized to issue the policy, and only a part of the occupancy is mentioned in the writing, the assured being in nowise responsible for the omission of the other, the insurer can not, by reason of such omission, escape payment of the loss.

2. Printed inhibitions against keeping certain articles can not be relied on to avoid a policy of fire insurance that insures the holder against the loss of those very articles.

A policy of insurance upon a stock of dry goods, etc., "and such other articles as are usually kept in a country store," was not avoided by the keeping of gun powder and coal oil, although a printed condition in the policy prohibited the keeping of these articles unless the consent of the company should be indorsed on the policy, it appearing from the proof that gun powder and coal oil are "such articles as are usually kept in a country store."

3. Failure to endorse consent—The agent who took the policy in this case having testified that he knew gun powder and coal oil were generally kept in country stores, and that if his attention had been called to the matter at the time he issued the policy he would have endorsed thereon the privilege of keeping them, the company is as much bound as if the permission intended to be given by the agent had been endorsed on the policy.

4. Renewal of policy—Where a policy is renewed by a different agent from the one who took the original policy, without an application made to the new agent, the new contract is the same as the old, the foundation for the new contract being the representations made to the original agent, and the understanding existing between him and the assured.

Appeal from Franklin Common Pleas Court.

Opinion of the court by Judge Richards.

The appellant issued to the appellee a fire insurance policy, dated November 25, 1878, to protect him against loss for the period of one year. The following was the written portion of said policy: "\$500 on his one-story frame, shingle roof building, occupied by assured as a store, about fourteen miles from this agency, on the turnpike road leading from Midway to Versailles, in Woodford county, Kentucky, and \$2,000 upon his stock of dry goods, clothing, boots and shoes, hats and caps, groceries and such other articles as are usually kept in a country store, contained therein." This policy was renewed in

1879, and again in 1880, there being no substantial variation from the above quotation. While the last policy was in force the building and stock of merchandise were destroyed by fire. This action is to recover the amount of the loss. The company denies its liability for any sum, and bases its defense upon these grounds:

1st. That there was a misdescription of the property and its occupancy.

2d. That coal oil and gun powder were kept for sale.

3d. That coal oil was used in the store for lighting purposes.

The description given in the policy of the building itself covers the whole structure for which the assured claimed indemnity. It was a "one-story frame, shingle roof building," situated on the turnpike mentioned, consisting of three rooms, all under one roof; but it appears that only one of these rooms was "occupied as a store," the other two being used as a blacksmith's and wagon maker's shop.

The assured testified that at the time he applied for the policy he gave the agent a full description of the property, explained how the rooms were located and occupied. This agent says he can not remember whether the assured mentioned the shops or not, and adds: "I put questions to him with a view to getting description and occupancy of building, and he answered fully and frankly all, and I now believe if any error was committed in description and occupancy of building the fault was mine and omission mine, and not Mr. Nugent's."

The assured also states that the agent told him, in answer to his complaint in regard to the high premium charged, that the insurance was more costly by reason of the shops. He further says that the agent promised at the time to come to see the property, which he did shortly thereafter. The agent states that he did stop in passing, but found Nugent absent, and made no examination of the premises, although "there was nothing to prevent me from having a good view of the premises." The person from whom the agent inquired for

Nugent was named Morris, and was the blacksmith in charge of the shop at that time. His deposition was taken. He says that the agent, on the occasion mentioned, drove up within three or four feet of the shop door, which was about nine feet wide, and open; that he was at the time engaged at his work, with his coat off and sleeves rolled up; that a door into the wood shop, five feet wide and six feet high, was also open; and that a person in the position occupied by the agent could see everything going on in the shops.

Where a party has, by misrepresentation or concealment of facts touching the occupancy of a building procured insurance which he could not have obtained had the truth been known to the other contracting party, the insurer can, at any time, avoid his liability under the policy; but, on the other hand, where the character of the occupancy was fully explained to the agent authorized to issue the policy, and only a part of the occupancy is mentioned in the writing, the assured being in nowise responsible for the omission of the other, the insurer can not, by reason of such omission, escape payment of the loss.

Among the printed conditions in the policy was one prohibiting the keeping or using of gun powder or coal oil in the building insured unless the consent of the company was endorsed on the policy, the endorsement to specifically name each article, and declaring the policy void if the condition was violated. The proof shows that both were kept for sale in the store, and also that coal oil was used for lighting purposes. But the proof also establishes that gun powder and coal oil are "such articles as are usually kept in a country store."

Where there is an inconsistency between the written and printed portions of a policy the former must control. Printed inhibitions against keeping certain articles can not be relied on to avoid a policy that insures the holder against the loss of those very articles. We are aware that there are some cases in which the contrary has been held, but we are of the opinion that the rule announced above is the correct one, and numerous authorities can be cited in its support. Nor can any hardship

result to the insurance business by its adoption. If certain articles are to be excepted when insuring a general stock of merchandise, they can be easily stated in the writing, without compelling the holder to look for it through a bulk of printed matter, which in the case before us embraces one hundred and fifteen lines. The interests of the public demand that when a person contracts for a policy covering a general stock of merchandise, and the risk is written pursuant to his contract, he shall not be compelled at his peril to carefully examine the printed matter to ascertain whether the company has attached a condition inconsistent with its agreement. He has the right to extend full faith and credit to the written statements of the company, and conduct his business accordingly.

But in the case at bar the agent who first issued the policy testifies that he knew that coal oil and gun powder were generally kept for sale in country stores, and coal oil used for lights. He further states that if his attention had been called to it at the time he issued the policy he would have endorsed thereon the privilege of keeping them for sale, and using the oil for light.

Nor does the fact that the agent who took the original risk, Mr. Samuels, was not the agent when the policy was last renewed make any difference.

On November 24, 1879, the day before the policy issued by him expired, Mr. Samuels wrote Nugent, inclosing him a policy for the coming year, issued by the new agents, F. C. Hughes & Co., and instructing him to pay the premium to them. Under these circumstances Nugent had the right to rely upon his contract being the same, and it was the same under the new regime as it had been under the old. There was no application made to the new agents; they simply reissued the policy. The foundation for the contract was the representations made to the original agent, and the understanding existing between him and the assured. Under these the company is as much bound as if the permission intended to be given by Samuels had been actually endorsed on the policy.

The proof is conflicting as to the amount of the loss, but we see no reason for disturbing the chancellor's finding.

Judgment affirmed.

D. W. Lindsey for appellant.

J. W. Rodman for appellee.

NEW BOOKS.

Federal Decisions. Cases in the Supreme, Circuit and District Courts of the United States from the time of their organization to the present date, with extracts from the opinions of the Court of Claims and the Attorneys-General and the opinions of general importance of the Territorial Courts. Arranged by Wm. G. Myer. Vol. XIV, Dedication—Equitable Suits. Gilbert Book Co., St. Louis, Mo., 1886.

This, the fourteenth volume of this series, is up to the standard of its predecessors. The arrangement is good and the editorial work is well done. The subject of the Domestic Relations takes up a large part of the volume.

Western Reporter. Volume I. All cases determined in the Courts of Last Resort, as follows: Ohio, Supreme Court; Indiana, Supreme Court; Illinois, Supreme Court; Missouri, Supreme Court and Courts of Appeals. From September, 1885. Robert Desty, Editor. The Lawyers' Co-operative Publishing Co., Rochester, N. Y., 1885.

This volume begins with, and the Reporter is to embrace, the reports of all cases decided by the courts of last resort, from September 1, 1885, in the States of Ohio, Indiana, Illinois and Missouri. In addition to the opinion of the court there are added in many of the cases statements of the cause of action, with sufficient of the briefs of counsel to trace the line of their arguments.

August, 1886—5

The Kentucky Law Reporter

EDITOR:

EDWARD W. HINES Frankfort, Ky.

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No. 3 .

In this number of the Reporter we publish several unreported opinions of the Court of Appeals delivered prior to the establishment of the Law Reporter, and propose to publish others, in full or in abstract, each month. These opinions have never been published in any form and will be valuable and interesting to the profession. This new feature of the Reporter will make it indispensable to every attorney in the State of Kentucky, as these opinions, as well as the opinions of the Superior Court, are not published elsewhere.

KENTUCKY COURT OF APPEALS.

WEBBER, &c. v. GIBSON.

(Filed September 16, 1885—Not to be reported.)

1. Limitation—Thirty years' statute—Possession for thirty years under a sale by husband and wife of the wife's land bars a recovery by the wife, notwithstanding her disability, but where the sale was by the husband alone prior to the act of 1846, limitation, even under the thirty years' statute, does not begin to run against the wife until the death of the husband.

2. Possessory title—Plaintiffs were not entitled to recover land upon a possessory title as against one who, at the institution of the action, had been in the actual possession of the land claiming it as his own for over forty years.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Holt.

This action was brought by Polly Webber and Eliza Ann Shirley on January 17, 1880, against John C. Gibson for the

division of a tract of land held by him of about 300 acres, and the allotment to each of them of an undivided interest. The petition alleges that it belonged to their father, Wm. Bledsoe, who died testate in July, 1817; that he devised the one-third of his estate, both real and personal, to his wife during her life and then to his fifteen children equally; and the remaining two-thirds to his children equally, save a slave that was given to one of his sons. The wife, together with some of the children, remained in possession of all of the land in contest until her death in 1838, and then, or possibly not till in 1839, the appellee took possession of the land, claiming it as his own. His father, who had then purchased all or most of the interests of the Bledsoe children, lived with him; and it was then understood between the father and the son that the appellee was to have this land, but the father never conveyed it to him. It was then in the main uncleared, but little improved, and of little value as compared with its present worth. The father died testate in 1849, his will providing that the appellee, who was one of his executors, should have 200 acres of this land, and the remainder of it by paying his three brothers a certain sum. After his death the four sons settled and divided the estate, the appellee retaining all the land and accounting to his brothers as required by his father's will, but no conveyance was ever made to him by them.

Polly Webber married Philip Webber prior to October, 1827. He died on March 10, 1877, or nearly three years before this suit was brought, having on October 20, 1827, executed a title bond in the name of both himself and his wife, but in which she did not unite, to the father of the appellee, which upon its face purports to convey the entire interest of himself and wife in the estate of her father.

Eliza Ann Shirley married John Shirley prior to April, 1830, and he died on May 18, 1866, or nearly fourteen years before this action was instituted. On April 24, 1830, he executed to one Ross a title bond for his wife's interest in her father's estate; and his wife's name is signed to it by mark and attested

by a witness, but she testifies that she did not sign it. There is no testimony in the record showing its execution, nor is the absence or death of the attesting witness shown. It appears, however, that she could not write and that she knew of the sale by her husband to Ross. Under these circumstances, and in view of the age of the paper, we are of the opinion that while she is perhaps honest in her statement, yet that her recollection is at fault and that she in fact signed the bond.

It was assigned by Ross to the appellee's father on February 17, 1836.

The answer of the appellee denied all of the material allegations of the petition, and also relied upon his long-continued possession of the land.

Under a rule of the court he was compelled over his protest to produce and file the two bonds above named. He testifies, however, that they were among his father's old papers, which came to his hands as his executor; that he never knew their contents until after this suit was brought, and never knew of their existence till after his father's death; that he had always claimed and held the land under the parol gift of his father in 1838 or 1839, sanctified by his will; and that he had never claimed by virtue of the bonds or through the plaintiffs. It does not appear that the father ever claimed the land by virtue of the bonds, nor is there any satisfactory evidence that he ever claimed title through the plaintiffs, although the circumstances point in that direction.

The plaintiffs also sought to recover their portion of the interest of a brother and two sisters, who died intestate and either unmarried or without heirs. It is conceded in argument that they are not entitled to this relief as to the portion of one of said sisters, whose name after her marriage was Winifred Ellis.

As to their interest in the portion of the other sister, Virginia, and their brother, James, we infer from the testimony that title bonds had been given therefor similar to those for their own interests, and hence the same questions are presented as to all the interests.

Mrs. Shirley having united in the sales made more than thirty years before the bringing of this suit, is not entitled to recover under the ruling in the cases of *Medlock, &c. v. Suter, &c.*, 80 Ky., 101; *Bransom, &c. v. Thompson, &c.*, 81 Ky., 387; *Mantle, &c. v. Beal*, 5 Ky. Law Rep., 889.

Mrs. Webber did not, however, unite in the sales of her interests in the land, and they having been made prior to 1846 the husband had a right to sell his life estate; and although the bond purported to convey the fee, yet as every grant is effective to the extent of the grantor's right, it was sufficient to pass his life estate; and until his death the wife, as in case of a remainderman, could not sue; and as he died within less than three years prior to the bringing of this action, she is entitled to recover unless there is some other legal obstacle in her way.

The action, although in equity, is in substance an ejectment. It is not shown that Wm. Bledsoe had any title whatever to the land. It appears he was in possession of it as early as 1808, and claimed it as his own. One witness, who is a son of Wm. Bledsoe, testifies that he heard from the family, but not from his father, that he had a bond for a title, and another witness says that he got the land from one Johnson; and this is all the testimony even tending to show that he had a title.

The appellants, however, while conceding that they must recover upon the strength of their own title, say that they are entitled to recover upon a possessory one. We are, however, of the opinion that this is not permissible as against one who, at the institution of the action, had been in the actual possession of the land, claiming it as his own for over forty years.

But he is told that he bought of the husband, who attempted to sell the fee when they had but a life estate; that his possession had been amicable, and that he is estopped from claiming against us. Admitting that he did so buy it does not prevent him from replying that you are the plaintiffs, and you must show your own title before you can recover. The appellee has been in possession for over four score years. During that time

he has in good faith cleared and improved the land greatly and largely enhanced its value, and the equity of the case as well as the law protects him in his home.

Judgment affirmed.

Geo. C. Drane for appellllant.

Masterson & Gaunt and J. J. Landram for appellee.

Note—The principal case, in so far as the court holds that a possession for thirty years under a sale by the husband of the wife's land in which the wife did not unite, did not bar a recovery by her seems to be in conflict with some expressions of the court in *Bransom, &c. v. Thompson, &c.*, 5 Ky. Law Rep., 359, but those expressions were evidently made with reference to sales made subsequent to the act of 1846, and, therefore, are in fact not in conflict with anything in the principal case, in which the sale under which the defendant claimed was made prior to that act, and, therefore, passed the life estate of the husband.

The court in the principal case seems to assume that if the plaintiff had been discovert three years section 6 of article 1, chapter 71, General Statutes, would apply, although she did not unite with her husband in the sale of her land, whereas the statute provides that "if a woman, after she arrives at the age of twenty-one years, join with her husband in the conveyance of her lands or chattels real, and acknowledged the conveyance before an officer authorized to take her acknowledgment of the conveyance, no action shall be brought by her for the recovery of the lands or chattels real mentioned in such conveyance unless the action is commenced by her within three years after she becomes discovert."

LEE, &c. v. WALSTON, &c.

(Filed January 17, 1880—Not to be reported.)

Garnishees—A garnishee having answered admitting an indebtedness may be required to respond to an amended pleading filed by the attaching creditor, or by a third party claiming the fund, alleging that he owes more than he has admitted, and the fact that the amount claimed against the garnishee exceeding the sum admitted by him is under \$50, does not deprive the court of jurisdiction as to such excess, the claim being a unit and the whole of it in controversy.

Appeal from Marion Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

The pleadings are so confused in this case that it is difficult to learn the real issue on this appeal. The question, and the

only one we propose to consider, is the right of the appellants to show, upon proper allegations by an amended pleading, that the garnishee has failed to disclose the real amount of his indebtedness.

Rodimer had been garnisheed by Bailey & Walston to secure a debt owing them by Mike Lee. Rodimer came into court and admitted an indebtedness. These appellants by petition were made parties, and they claim that the amount owing by Rodimer had been transferred to them and by an amended cross petition allege that Rodimer had failed to make a full disclosure of his indebtedness for the corn, but was owing a larger sum for corn sold and delivered by the debtor to him at his request, etc. They were permitted to be made parties, and exhibited a claim to this particular fund. The indebtedness by Rodimer to Lee originated from a single transaction, and by an express provision of the Code an attaching creditor may, by an original or amended pleading, proceed against the garnishee by petition when the latter fails to make disclosure. These appellants were before the chancellor asserting their right to the whole fund, and said to the garnishee you owe more than you admit, and then set forth the consideration. The garnishee is out of court in so far as he is required to plead when he files his answer denying or admitting, if a mere garnishee; and the only way you can get him into court is by an amended pleading in the same action or an original petition attacking the truth of the statements made by him and setting forth a cause of action by the debtor. These appellants were compelled to come into court to litigate their right to the money, and it being a single transaction we see no reason why they should not be allowed to say that the debt was for more than is admitted, and require the garnishee by a proper pleading to respond as to the claim. The chancellor ought not to sever the claim, and by rendering a judgment for a part of it in one action require the party entitled to bring his separate action for the remainder. But it is alleged that the amount claimed against the garnishee exceeding the sum admitted by

him is under \$50, and, therefore, there is no jurisdiction to revise. The claim is a unit, and the whole of it in controversy. It is as if an original action had been brought, and the party admitted an indebtedness of all but \$47. The amount claimed in the petition must govern. We see no reason, and particularly in a court of chancery, in saying that parties who are compelled to litigate about one transaction, in order to have their rights determined, shall have a part of the relief in one court, but in order to obtain complete relief must seek another forum. You can take judgment for a part of this note, but as to the balance you must sue at law. It prevents multiplicity of actions by putting an end to litigation when all the parties are before the court and required to assert their rights. To determine otherwise, the plaintiff in the attachment and the plaintiff in the cross petition have a cause of action for one part of the debt in this proceeding, and another for the balance due in an independent action and perhaps in the same forum. When each party is asserting a right to the entire claim and the one or the other entitled to it, they should be allowed to litigate their right, and a judgment rendered in favor of the party entitled. The question as to damages by reason of the garnishee will be settled should the appellants recover by a judgment for the debt, interest and their costs; this is all they can recover.

Judgment reversed and cause remanded.

Russell & Avritt for appellants.

John McChord for appellees.

GRIGSBY v. GRIGSBY.

(Filed May 27, 1880—Not to be reported.)

Contracts—Meritorious consideration—The principle which upholds a mere voluntary contract to provide for a wife or a child does not extend to a brother or other collateral kindred.

In this case the chancellor refuses to enforce a mere voluntary agreement by one brother to give to another the benefit of the purchase by the former of the latter's property at bankrupt sale.

Appeal from Clark Common Pleas Court.

Opinion of the court by Chief Justice Pryor.

In the opinion of the chancellor the judgment for the appellee is made to rest alone on the idea that a trust had been created or declared in favor of the appellant by the letter written many years prior to the filing of the appellee's answer and cross petition. That the appellant, John B. Grigsby, had purchased the interests of the appellee in his father's estate as well as his interests in other property at the sale by the assignee in bankruptcy is conceded, and in no pleading filed by the appellee is it alleged, directly or inferentially, that the purchase was made for the appellee, or that any agreement existed between the two that the purchase should be made for the appellee's benefit. It is, however, alleged that subsequent to appellant's purchase the latter, for a valuable or legal consideration, agreed to give, or rather did give, to the appellee, all the interests he had purchased at the bankrupt's sale; that this agreement was based on the consideration that the appellee would remain in Kentucky and return to Winchester his former home. An amended answer was also filed in which it is alleged in plain terms that the appellant agreed to surrender his interest purchased at the sale by the assignee in bankruptcy on the condition that the appellee would remove from New York to Kentucky, and resume the practice of the law in Winchester. A performance of the contract on the part of the appellee is alleged and a noncompliance on the part of appellant. The chancellor finds that the contract as set forth is not established by the proof, and in this view of the case we concur.

The two brothers make conflicting statements in regard to these promises on the part of the appellant, and leave the case as if no proof had been taken on the issue made. The appellee during the progress of the case introduced in evidence a letter written to him by the appellant in April, 1872, in which he (appellant) says: "I wrote you long ago that I bought your interest in everything in Kentucky and Louisiana at the sale

in bankruptcy for \$100, and if there was anything made out of it you should have the benefit of it."

It is not pretended that the property was impressed with a trust at the time it was purchased or when the conveyance was made, but that the appellant has created a trust by announcing his intention to permit his brother to have the benefit of his purchase. This letter might be persuasive evidence of an agreement to purchase for the appellee, but when this fact is not alleged and the whole case made to rest on a promise to give, upon certain considerations stated to have existed, it is difficult to perceive how a trust is to be established when no such claim is asserted by the appellee.

Regardless, however, of this view of the question, we can not assent to the proposition that a declaration of an intention to give creates such a trust as will be enforced or such a contract as will enable the chancellor to say that the promise should be enforced. The promise to give in this case is purely voluntary, and with a view of aiding a brother in pecuniary trouble. The gift never was perfected, and the proof shows that when a demand was made of the appellant to the effect that he should convey the property he made a partial conveyance, or rather a conveyance of a part of the property purchased by reason of his gratuitous promise, and declined to convey the interest in his father's estate for the reason, as is alleged and to some extent established, that he had made advancements in money to the appellee equal in value to the interest claimed. This court, in the case of *Buford's Heirs v. McKee*, 1 Dana, 107, in discussing the doctrine applicable to the question involved here says: "The whole foundation of the principle which turns mere gratuitous engagements and voluntary promises of bounty and munificence into contracts of obligatory efficacy is of such doubtful equity that we feel no disposition to carry it further than it has already gone." In this case the equity asserted by the appellee does not strike the mind of the chancellor so as to control his action in the case when he con-

siders the liberal advancements made him by his brother during the existence of his pecuniary troubles.

The doctrine announced by this court in cases involving the principle on which this judgment was rendered is adverse to maintaining or enforcing mere voluntary agreements between collateral kindred, and in no case in this court has this doctrine been recognized.

To determine a trust in this case would be to enforce a voluntary agreement or mere gratuitous promise by one brother that he would aid the other by giving him property to which the donor at the time had a complete and perfect title.

In the case of Buford v. McKee the covenant was to give land to his nephew. Where there is a mere intention (says Perry), and the donor contemplates some further act to be done by him to give it effect, the trust is not completed, and if voluntary can not be enforced. (Perry, 96, 97, 98.) But, as before stated, it is nowhere alleged that a trust was created or declared, and the right of recovery is made to depend alone upon the contract as alleged.

The inconsiderable sum paid for the property, together with the declaration of an intention that the brother should have the benefit of the purchase, would go far toward showing that the purchase was made in the first place by appellant as his brother's agent and for his benefit, but the argument made by counsel on this ground can not be maintained as no such claim is presented by the pleadings. We understand the issue here is as to the interest of the appellee in his father's estate only, and with a proper pleading seeking a recovery on the idea of a trust the appellant might have interposed a defense other than the mere denial of the existence of the contracts alleged to have been made between these parties. The judgment below is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Chas. Eginton, B. J. Peters and W. P. D. Bush for appellant.
Wm. Lindsay for appellee.

GRAYSON COUNTY COURT v. BRECKINRIDGE COUNTY COURT.

(Filed February 25, 1886—Not to be reported.)

County courts—Erection of bridges between counties—When one county refuses to co-operate with another in the erection of a bridge over a place between the two counties as provided by section 36, chapter 94, General Statutes, and the circuit court issues a mandamus, upon the return of the mandamus the circuit court is required to hear such evidence as either party may adduce touching the matter in controversy, and this is not confined to the mere convenience or necessity of the improvement, but should have reference also to the financial condition of the county sought to be required to make the improvement.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Pryor.

A mandamus was awarded in this case on the application of the county judge and justices of the county of Breckinridge against the county judge and justices of the county of Grayson, compelling the latter to appoint a commissioner for said county, who shall agree with the commissioner appointed by Breckinridge county on a plan for the erection of a bridge across Rough creek, at the mouth of Salt Peter Cave, this creek being on, or constituting at this point, the dividing line between the two counties.

The county court of Grayson was also directed, in conjunction with the Breckinridge County Court, to erect said bridge, and to pay its proportion of the costs of construction, etc. This proceeding was had under sections 36, 37 and 38 of chapter 94, General Statutes.

By the 36th section of this chapter, when the county court of any county shall deem it advisable to erect a bridge, etc., over any place between that and an adjoining county, the court shall appoint a commissioner, and notify the court of the adjoining county thereof, and request the latter to appoint a like commissioner, and it shall be the duty of the court so requested to appoint such commissioner. When the county court shall refuse to act when notified, the circuit court of the county so refusing may issue a writ of mandamus to the county court requiring it to show cause why an order shall not be entered

directing the appointment of a commissioner and the erection of the bridge, etc.

On the return of the mandamus the circuit court shall hear and consider such evidence touching the matter as either party may adduce, and shall either dismiss the proceeding or award a peremptory mandamus, as may seem proper. The peremptory mandamus having been awarded, the Grayson county court has appealed.

Several preliminary questions have been raised by counsel for the appellant that if decided would not determine the merits of the controversy, and, therefore, without considering those objections, we will pass to the consideration of the principal question involved. The county court of Grayson county declined to co-operate with the county of Breckinridge in the erection of the bridge, because of the financial condition of the county, and if this constituted a defense to the writ the proceeding should have been dismissed.

That the erection of a bridge at the point designated would facilitate travel and be of great convenience to the citizens of both counties the proof, in our opinion, clearly establishes, but that the construction of a bridge at that point is indispensable to the inhabitants of either county is not shown by the proof.

Nor is this court to be understood as adjudging that an absolute necessity must exist for the erection of such an improvement before the discharge of such a duty will be compelled by the writ of mandamus, but, on the contrary, if the financial condition of the county of Grayson exhibited no other indebtedness than such as is created in the usual and ordinary expenditures for county purposes, such as building bridges, improving roads, supporting its poor, and erecting its public buildings, this court would not hesitate to affirm the judgment below; but a different state of case is presented by the defense, the truth of which is not controverted by the appellee. The circuit court is directed to hear such evidence as either party may adduce touching the matter in controversy, and this is

not confined to the mere convenience or necessity for the construction of the improvement, but also to the financial condition of the county required to make the expenditure. The county proceeded against for failing to discharge such a duty must show some valid reason for not complying with the provisions of the statute.

The discretion confided by law to the magistracy of the county in reference to the county expenditures has been taken from that body in a case like this, and placed with the circuit judge of the county, who acts as an arbiter between them, and determines from the facts for and against the proposition the expediency of making the improvement. The county of Grayson says that it is financially embarrassed with an indebtedness upon its people in the form of taxation that is already burdensome and oppressive, and which should not be further increased to the great injury of its taxpayers. It has a bonded indebtedness, growing out of subscription to railroads, of \$170,000. A portion of this sum is bearing 7 per cent. interest, and the balance 6 per cent. The taxpayers have now to pay \$2 poll tax and \$1 on each \$100 worth of property to pay interest on bonds and create a sinking fund, etc.

The county has borrowed of the sinking fund \$30,000 or \$40,000 with which to erect necessary public buildings, such as a courthouse, jail, etc., and has never repaid the same; has made other large expenditures in erecting bridges and making county improvements until its people are in an impoverished condition.

It had appointed commissioners to confer with the commissioner of the Breckinridge County Court, but declined by reason of its inability to meet its engagements to aid in this public enterprise.

The discretion of the county court on the subject was not abused, but was reasonable and proper. The county was in no condition to further increase the burden of taxation, and these facts appearing in the record and not controverted, the circuit.

judge should have approved the action of the Grayson County Court and dismissed the proceeding.

Judgment reversed and the case remanded, with directions to enter judgment as herein indicated.

Jas. S. Wortham and Wm. Lindsay for appellant.

Montgomery & Poston for appellee.

MAYHER v. CITY OF LEXINGTON.

(Filed June 3, 1880—Not to be reported.)

Municipal corporations—Validity of ordinance—An ordinance of the city of Lexington imposing an annual tax upon each delivery wagon used by vendees of milk was void, there being nothing in the charter of the city conferring upon the council the power to pass such an ordinance. The power to pass such an ordinance must come from a direct grant.

Appeal from Fayette Common Pleas Court.

Opinion of the court by Judge Hines.

The only question presented on this appeal is whether the following ordinance of the city of Lexington is valid:

“That vendees of milk, who use a milk wagon or other vehicle for delivering their milk to their purchasing customers in the city of Lexington, shall pay in advance to the treasurer an annual tax of \$10 for each wagon or other vehicle so used.”

There is no brief for appellee, but from an inspection of the charter, approved February 16, 1867, it appears that if there is power to pass such an ordinance it must be found in sections 16, 18 or 55. Section 16 applies only to license to certain business houses, and section 18 to license for vehicles used or run for hire. Appellant does not appear to come under either of these heads. The license required of him by the court below is not for transacting any business specified in section 16, nor is the vehicle owned by appellant used for hire so as to be covered by section 18. Section 55 is in effect what is usually denominated the “general welfare clause,” and clearly does not confer power on the city council to pass such an ordinance. The power to pass such an ordinance must come from a direct

grant. (Cooley on Taxation, 408; Kniper v. City of Louisville, 7 Bush, 608; Commonwealth v. Voochies, 12 B. M., 362; Dillon on Municipal Corporations, sections 250, 605.)

Judgment reversed and cause remanded, with directions for further proceedings.

Huston & Mulligan and T. N. Allen for appellants.

LINCOLN COUNTY COURT v. NATIONAL BANK OF STANFORD.

(Filed March 30, 1880—Not to be reported.)

Taxation—Banks—Bank stock is a liability of the bank to its stockholders, and the bank can not, therefore, be required to list it for taxation for county purposes.

Appeal from Lincoln Circuit Court.

Opinion of the court by Chief Justice Pryor.

If the bank stock can be made liable or subject to taxation for county purposes, there is no law making the bank an agent for the stockholder to list this estate, and certainly no statute requiring the bank to pay the tax of the stockholder.

It is the property of the bank that must be listed for taxation and not the property of the stockholder. The case of the Trustees of Eminence v. The Deposit Bank, 12 Bush, --, is conclusive of this question. The bank owes the amount of the stock to the individual stockholders, and can not be taxed on its liabilities. (National Bank v. Commonwealth, 9 Wallace, 353.)

Judgment affirmed.

W. H. Miller for appellant.

J. S. & R. W. Hocker and Hill & Allcorn for appellee.

TIMBERLAKE, &c. v. CITY OF NEWPORT.

(Filed May 29, 1880.)

Bar—Judgment dismissing petition—A demurrer sustained to a petition because it presents no cause of action constitutes no bar to another action, but where the defendant pleads and places in issue the right of recovery the

case is then ready for proof and a submission on the petition and answer, and a judgment thereon dismissing the petition, is as much a bar as if proof had been introduced on each side of the case.

Appeal from Campbell Chancery Court.

Opinion of the court by Chief Justice Pryor.

On the former hearing of this case involving the right of the city to recover for the identical claim for which the present judgment was rendered the case was tried on its merits and a judgment rendered dismissing the appellee's petition. In discussing the question raised in this court involving the sufficiency of the pleading on the part of the city it was held that the petition was defective by reason of the failure to make certain averments, still with the answer filed the case might have been disposed of on the merits, and was doubtless so adjudged by the court below. The allegations of the petition were traversed by the answer, and the liability of the appellant to the city placed directly in issue.

A demurrer was interposed to the answer and overruled, and the appellee, the city, regarding the answer as presenting no defense, submitted the case on the petition and answer, and a judgment was rendered for the defendant, and of course involved the right of recovery.

A demurrer sustained to a petition because it presents no cause of action constitutes no bar to another action, but where the defendant pleads and places in issue the right of recovery the case is then ready for proof, and a submission on the petition and answer, and a judgment thereon dismissing the petition, is as much a bar as if proof had been introduced on each side of the case. The whole merits of the case could have been tried on the issue made, and were in fact tried when the statements of the answer were admitted as true. An issue of fact was certainly made by the answer of the defendant, and the city relying on the pleadings as conclusive of the right to recover, submitted the case. This was a trial on the merits, and the plea in bar should have been sustained. This court on affirming the judgment may have and did determine that the

petition was insufficient, but still the defendant was entitled to demand a trial on the facts, and when conceding the statements of the answer to be true for the purpose of a hearing, it is now too late for the plaintiff to question the sufficiency of its own complaint. Judgment reversed and cause remanded, with directions to dismiss the petition and give to the appellant his judgment for costs.

F. M. Webster for appellants.

A. T. Root for appellee.

KREIGER, &c. v. SHELBY RAILROAD CO.

(Filed May 20, 1886.)

Appeal from Shelby Circuit Court.

Response to petition for rehearing by Judge Pryor.

See original opinion, 8 Ky. Law Rep., 8.

It is evident that the act of February 8, 1869, is but an amendment to the original act of incorporation, and while its provisions are indefinite as to the manner in which counties and district stock is to be voted, the acts of March 11, 1870, and of the 26th of February, 1873, only makes that certain which before was uncertain, or had been omitted from the original act of incorporation by giving the district a distinct name, and authorizing it to be represented by the county judge and justices of the county. It is insisted that the district had no power to sue or be sued, and that this being one of the essential requisites of such a corporation or incident thereto, that it must be regarded as the mere agency of the people or the sovereign to subscribe the stock when voted for, and nothing more. While the act of 1869 is not perfect in all its parts, it is manifest, we think, that the district could be sued upon its bonds; and if not, the liability having been created, the amended acts of 1870 and 1873 only furnishes the means of enforcing that liability by providing a remedy by which the

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rights of the corporation may be asserted and its liabilities enforced. There has been no change of contract, but it is plain that proceedings in behalf of and against the corporation must be controlled by these amended enactments. They now constitute a part of the charter of the corporation. We see no reason for reversing the judgment below.

This is to be regarded as a part of and an extension of the original opinion. Petition overruled.

Barnett, Noble & Barnett, Hargis & Eastin, L. A. Weakley and Isaac Caldwell for appellants.

Bullock & Beckham and Russell & Helm for Shelby R. R. Co.

Bullock & Beckham and P. J. Foree for Shelby R. R. District of Shelby county.

COMMONWEALTH v. STEGALA.

(Filed January 6, 1880—Not to be reported.)

Indictment—Filing—Where the record shows that an indictment was returned into court as required by the Code, and ordered to be filed, the failure of the clerk to sign the endorsement on the back of the indictment, to the effect that it was filed in open court, will not authorize the dismissal of the indictment.

Appeal from Fulton Circuit Court.

Opinion of the court by Judge Hines.

The motion to dismiss the indictment in this case appears to have been sustained upon the ground that the name of the clerk was not signed to the endorsement on the back of the indictment, to the effect that it was filed in open court. The Code (section 122) requires that the indictment must be presented by the foreman, in the presence of the grand jury, to the court, and filed with the clerk, but it does not require that the only evidence of these facts shall be the signature of the clerk to the usual endorsement on the indictment. The record shows that the indictment was returned into court as required by section 121, was ordered to be filed, and that prior to the

dismissal the prosecution was once continued. The order of the court to file the indictment is equivalent to filing, and is in fact a filing of the indictment, and the signature of the clerk to the endorsement on the back of the indictment is intended to serve no other purpose than to identify the paper returned by the grand jury, which, in this instance, is sufficiently done by the endorsement of the foreman, to which reference is made in the order of the court.

Judgment reversed.

P. W. Hardin for appellant.

COMMONWEALTH v. SMOCK.

(Filed January 7, 1880—Not to be reported.)

Indictment—Perjury—False swearing before grand jury—Corrupt false swearing before a grand jury in respect to a matter being inquired of by it is perjury, if it had legal authority to investigate the matter and the false testimony was material; and it is not necessary that an indictment therefor should allege that the grand jury was sworn.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Cofer.

Although a grand jury is not a court, and an investigation before it is not a trial, yet the grand jury is a part of the judicial machinery, and an investigation by it is a judicial proceeding, and corrupt false swearing before it in respect to a matter being inquired of by it is perjury, if it had legal authority to investigate the matter and the false testimony was material.

Proceedings before those who are in any way intrusted with the administration of justice, in respect of any matter regularly before them, are considered as judicial for this purpose. (Bouvier's Law Dictionary, title "Perjury," section 5.)

And this seems to have been the understanding of our codifiers and the general assembly by which the law was adopted. (Section 110, Myer's Code; 113 Bullitt's Code.)

The case of Commonwealth v. Powell does not decide that perjury may not be committed by false swearing on a motion

for a new trial. All that is there decided is that such false swearing might be prosecuted under the statute, and as a statutory offense, and we may say the same here—every perjury includes false swearing, and if the prosecution should elect to do so he might prosecute for the statutory offense in any case in which he could prosecute for perjury.

It was not necessary to allege that the grand jury was sworn, any more than to allege that a judge or clerk had been sworn when the oath was administered by either of them.

It is alleged that Wakefield was foreman of the grand jury, and that he administered an oath to the appellee, and it must be presumed until the contrary is proved that the court did its duty, and caused the grand jury to be sworn.

The alleged testimony of the appellee was clearly material, and the court erred in sustaining the demurrer.

Judgment reversed and cause remanded, with directions to overrule the demurrer.

P. W. Hardin for appellant.

R. J. Browne for appellee.

DIGBY v. CITY COURT OF NEWPORT, &c.

(Filed June 15, 1880.)

1. Constitutional law—Police courts—The power of the legislature to establish police courts is not restricted to such towns and cities as are entitled to separate representation. Section 38 of article 4 of the Constitution does not relate to police courts.

2. Title of act—"An act to amend and revise the charter of the city of Newport" is a sufficient title to embrace not only so much of the act as creates a police court, but also so much as confers upon that court civil jurisdiction.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Cofer.

In our opinion section 38 of article 4 of the Constitution does not relate to police courts.

The phrase "municipal courts" is no doubt broad enough to include police and city courts, but the uniform practice of the

general assembly, from the adoption of the Constitution down to the present time, to establish police courts in towns and villages not entitled to separate representation, and the recognition by the courts of the legal existence of police courts in such towns, shows that this section has not heretofore been regarded as inhibiting the creation of such courts in towns not entitled to separate representation. Many such courts have been established and their proceedings in one way and another have been repeatedly before this court, and their legal existence has never been questioned.

Section 1 of article 4 vests the judicial power of the State in the Court of Appeals, the courts established by the Constitution and such courts inferior to the Supreme Court, as the general assembly may from time to time establish, clearly implying that the legislature has plenary power to establish such courts inferior to the Court of Appeals as it may deem proper, and section 38 seems rather to be an additional grant than a limitation upon the power to create courts.

Nor do we regard that part of the act conferring civil jurisdiction upon the city court of Newport as void because the subject of the act is not expressed in the title. Counsel concedes that the title is sufficient to embrace so much of the act as creates a police court and give it penal jurisdiction, and we are unable to see upon what ground that part conferring civil jurisdiction is to be rejected.

The title being sufficient to uphold that part of the act creating the court, that part regulating its jurisdiction would seem to be so connected as to be upheld also.

Judgment affirmed.

J. R. Hallam for appellant.

R. W. Nelson for appellees.

KENTUCKY SUPERIOR COURT.

COMMONWEALTH, FOR USE, &c. v. NETHERLAND'S
ADM'R.

(Filed June 19, 1886.)

1. County judge—Negligence in taking guardian's bond—Under the Revised Statutes (substantially the same in that respect as the General Statutes) the county judge was not liable in every case in which the surety in a guardian's bond taken by him was not "good;" all that was necessary was that he should satisfy himself of the sufficiency of the person or persons offered.

2. The county judge was liable where he accepted a bond signed by the guardian for the surety upon the mere oral statement of the guardian that he had authority so to do, when in fact he had no such authority.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Bowden.

It was provided by section 3, article 1, chapter 43 of the Revised Statutes, that no guardian could act until he had been appointed by the proper county court, and had "given covenant, with good surety, approved by the court, to the Commonwealth, faithfully to discharge the trust of guardian." Section 4 provides:

"If the court fails to take such covenant, or accepts such person or persons for surety as do not satisfy it of their sufficiency, the judges present and so in default shall be jointly and severally liable to the ward for any damage he may sustain thereby."

If the words "such covenant" meant that it must be a "covenant with good surety," then the judge would be liable in every case in which the surety was not "good," though there was no reason at the time to doubt the sufficiency; and the next clause would have been useless. The meaning was that if the court failed to take the covenant of the guardian and of one or more persons as his surety, he should be liable for any damages resulting; and that he should be also liable if, taking a covenant with surety, the person or persons taken "do not satisfy" him of their sufficiency. No method is prescribed whereby he must satisfy himself; he may take the sworn statements of the persons offered, or those of other persons; general reputation

even, without other evidence, might probably be deemed sufficient to satisfy; the unsworn statement of a man of undoubted character would possibly satisfy. This clause relates to the case in which the inquiry precedes the execution of the covenant, and makes it the duty of the judge by some positive means to satisfy himself that the person offered as surety is possessed of such property as will protect the ward. In the nature of the case there can be no certainty; the apparent financial condition may not be the actual condition; recorded deeds for land may deceive, as unrecorded conveyances or bonds for title may be held by others. Industrious good faith is all that can be demanded, and the statute requires no more.

But it is otherwise in regard to the provision requiring the court to take a covenant, not only from the guardian, but from some one or more, as security. Here absolute certainty is attainable. The person offered may come into court personally; or if that may not be done, he can execute a power of attorney, properly authenticated, authorizing another to execute the covenant for him. A diligent judge may, therefore, know, by having the person present, or by having an official authentication of a power, that the bond is the binding obligation of the person accepted as surety.

In this case Mitchell was appointed guardian, and signed the name of Peter as surety. The evidence is that Peter was not present; that the judge asked Mitchell if he was authorized to sign the name, and he replied that he was; and that thereupon the bond was accepted. All of the parties lived in the same town. It is true that it is shown that at that time Mitchell was a lawyer of good standing, master commissioner of the circuit court, and school commissioner for the county; circumstances were calculated to satisfy the judge that he would not, in so open and bold a manner, commit a forgery. But even if the statute should be held to make no difference between the fact of there being a surety and the fact of his sufficiency, placing the liability of the judge in both cases on

the common ground that he failed to take adequate means to satisfy himself, we should be of the opinion that the mere oral statement of the person asking to be made guardian, whereby he might get in his control all of the child's estate, should not be deemed sufficient to satisfy any diligent mind, especially when the person offered as surety lives in the same small town, and could have been brought into court without any trouble. The mere fact that, being so convenient, he did not come was calculated to arouse suspicion.

Mitchell failed utterly; Peter, being sued, maintained his defense that he did not authorize Mitchell to sign his name; the ward's estate was lost.

The issue, whether there was such authority, was again made by the administrator of the judge; the evidence is not all one way, but we think it sufficiently shows that there was no such authority.

We think the affidavit showed a *prima facie* case, and that it was sufficient.

It was not stated, either on the grounds for the motion or in the answer, that there was any injunction in force either when the appellant's petition was filed or afterwards. It is said the action was then pending, and that, therefore, an injunction had been granted; but as the court overruled the motion it need not now be further considered. If it was improperly overruled that would be no reason why a judgment in bar should stand if erroneous.

The statute of limitation was not a defense. The action was begun within less than a year after the ward arrived at age; it was based upon a liability created by statute, in which cases there is an express saving in favor of infants.

The case was submitted to have a decision on the question whether there was any liability, reserving the question of the extent for future ascertainment. The pleadings show a case within the jurisdiction of this court. In our opinion the plaintiff is entitled to recover damage he suffered by reason of the judge's failure to take a bond with good security.

The judgment is reversed and the case is remanded, with directions to render a judgment conforming to this opinion and for further proceedings to ascertain the extent of the liability.

Sam'l Avritt for appellants.

R. S. Montague for appellee.

KENDRICK, &c. v. GRAND LODGE A. O. U. W.

(Filed April 5, 1886.)

Presumption of death—The presumption of law that a person is dead when he has been absent from his domicile for seven years without being heard from relates only to the fact of death, and the time of death, whenever it is material, must be a subject of distinct proof. The fact of death alone being presumed, the jury must fix the date according to the circumstances of the particular case.

Appeal from Kenton Circuit Court.

Opinion of the court by Presiding Judge Richards.

It has long since been an established rule of evidence that where a person has been absent from his domicile for seven years without being heard from the law will presume him to be dead. This principle has been embodied in our statutes.

But it is now established by overwhelming authority, both in this country and in England, that the presumption of law relates only to the fact of death, and that the time of death, whenever it is material, must be a subject of distinct proof. This is the conclusion arrived at in a recent decision of the Supreme Court of the United States after an exhaustive review of all the authorities. (Davie v. Briggs, 97 U. S. Rep., 633.)

Therefore, in pleading under the statute, where the plaintiff's right to recover upon a policy of insurance depends upon death having occurred at a time when the assessments or premiums then due had been paid, nothing more is required of him than that he should allege the fact and establish it to the satisfaction of the jury. Of course the evidence upon this point must be wholly circumstantial in such cases, but nevertheless the fact of death alone being presumed, the jury must fix the date according to the circumstances of the particular case. If there

is nothing from which death could be inferred at a time prior to the expiration of the seven years, then the plaintiff, upon whom rests the onus of proving death at a particular period, must fail.

The petition in the case at bar alleges that the insured had not been heard from since the 4th day of August, 1875, about which time it is averred he departed this life, and further states that at the time of his death he was a member of the defendant's lodge, in good standing, having paid up all his dues and assessments. The demurrer to this pleading should have been overruled. Wherefore, the judgment is reversed and the cause remanded for further proceedings.

Dudley Glenn and Chas. H. Fisk for appellants.

A. C. Ellis for appellee.

KING'S EX'OR v. GODDARD.

(Filed March 12, 1886.)

1. Pleading—Set-off—Assignor and assignee—An answer which asserts a counterclaim or setoff is in the nature of a new action, and should be as specific and full as if it were in fact a petition; and this rule applies whether the defendant is seeking relief against the plaintiff or is simply asking to set-off against the demand sued upon a demand which he has against the plaintiff's assignor.

2. In an action by an assignee a demand against the assignor not due at the time of notice to the defendant of the assignment is not the proper subject of legal set-off, nor is the nonresidency of the assignor the ground of equitable set-off as against the bona fide assignee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Ward.

An answer which asserts a counterclaim or set-off is in the nature of a new action; it is a cross action in which affirmative relief is asked. It, therefore, follows that the answer should be as specific and full as if it was in fact a petition; and this rule applies, no matter whether the defendant is seeking relief against the plaintiff or whether he is simply asking to set-off his demand against the demand sued upon because of an offset which he may claim against the assignor of the plaintiff.

In this case the answer of appellee, Goddard, claimed as a set-off against appellant's demand notes which had been executed by appellant's assignor and assigned to him (Goddard) before he had notice of the transfer of the claim due by him. But there is no allegation of a promise by the maker of the notes to pay them, nor is it alleged that the notes had not been paid.

The notes upon which Goddard claimed the right of set-off were executed September 5, 1878, and did not mature until sixty days thereafter. They were assigned to him September 7, 1878. He alleges in his answer that he had no notice of plaintiff's mortgage or of his claim to the rents at the time the notes were assigned to him, but does not allege that he did not have notice before the maturity of the notes held by him against plaintiff's assignor. In *Graham v. Tilford & Barkley*, 1 Met., 112, it was held that a demand against the assignor not due at the time of notice of the assignment was not the proper subject of legal set-off in an action by an assignee. The grounds of equitable set-off were also considered in said case, and while it was held that an obstacle to the legal coercion of a demand, such as nonresidency, insolvency or the like, might be made the ground of equitable set-off against the person owning the paper at the time the demand was acquired against such person, still this equitable claim could not prevail against the intervening and superior equities of bona fide assignees. So the allegation that Mrs. Vance was a nonresident did not cure the defect in failing to allege a want of notice before the maturity of the demands relied upon as set-off. The answer was defective in the particulars referred to, and the demurrer should have been sustained.

Wherefore, the judgment is reversed and the cause remanded, with directions to set aside the judgment and to sustain the demurrer to the answer, with leave to appellee to amend if he desires to do so, and for further proceedings.

O. S. Poston for appellant.

T. C. Bell for appellee.

RULE'S ADM'R v. WILLIAMS.

(Filed March 5, 1886.)

1. Bills and notes—Endorsement for accommodation—Consideration—The consideration passing from the obligee to the obligor in a note is sufficient to sustain an action against a stranger who has endorsed the note for accommodation.

2. Assignment—Section 14 of chapter 22 of the General Statutes, which provides that "every person who shall sign his name upon the back of a promissory note shall be deemed and treated as an assignor as to the party holding it unless," etc., applies only to strangers to the note and not to the payee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Ward.

This suit by appellant against appellee was based upon a promissory note which reads as follows:

"\$750.

Catlettsburg, Ky., June 16, 1875.

"Four months after date I promise to pay to the order of Mordecai Williams seven hundred and fifty dollars, without defalcation, for value received, payable at the Ashland National Bank of Ashland, Ky.

"SAM'L K. SCHWENCK."

The note was endorsed by Williams, and delivered by him to Schwenck, who delivered it to appellant's intestate.

The following facts are alleged and not controverted: That appellant's intestate was the owner of a tract of land which was sold by her, through the agency of the appellee, to the Keys Creek Railroad Co. Notes were executed for the unpaid purchase money, and a lien reserved to secure their payment. Afterwards the railroad company, wishing to secure a release of the lien, its general manager, Schwenck, agreed to execute his note for the balance of the purchase money, \$800, and secure it by the endorsement of appellee Williams. The note was accordingly executed by Schwenck and endorsed by Williams, and delivered to Mrs. Rule, or her husband for her, and the lien was released. Suit was instituted on this note; Schwenck desiring further time, an arrangement was made to that end by the payment of the interest and \$50 of the prin-

cipal, and the costs of that suit, and the execution and endorsement of the note sued on.

It is alleged that Schwenck was a resident of the State at the time this note was executed; that he left the State and was a nonresident at the maturity of the note; that he was insolvent; did not have any property in this State out of which the note or any part thereof could be made. That he was a resident of this State at the time the note was executed is denied, but as no question was made in the lower court, or can be successfully made here, that the appellant has not exercised legal diligence so as to be entitled to recourse upon Williams, as the assignor, if any she has, no further notice need be taken of that question.

It is insisted for appellee that his liability is to be determined by section 14, taken in connection with section 7 of chapter 22 of the General Statutes, and that as no consideration passed between him and the assignee he is not liable, but in this conclusion we could not concur, if it was admitted that section 14 was applicable to the case. For, as held by the Court of Appeals in the case of *Krachts' Adm'r v. Obst*, 14 Bush, 37, and by this court in the case of *Greer v. Bright*, 7 Ky. Law Rep., 162, the consideration passing from the obligee to the obligor is sufficient to sustain an action against a stranger who has endorsed the note for accommodation.

It would seem that the court was divided in the last named case, but this division was simply as to whether there was a sufficient allegation to show what was the consideration between the obligor and the obligee. Judge Richards, on a petition for rehearing, concurred with Judge Ward in the opinion that the consideration was sufficiently alleged.

But we think it manifest that section 14 does not apply to a case like this. That section is to be read as though the words "without being the payee in such note" were inserted just after the word note in the second line of said section. This section was intended to repeal and change the law approved.

January 24, 1866 (Myer's Supplement, page 741), so as to prevent a party from writing over an endorsement, in blank, a contract of guaranty, and to limit the liability of such an endorsement, nothing else appearing, to that of an ordinary assignor. This law was not intended to change the law as it then existed as to persons who were not strangers to the note. The facts alleged show that the consideration in this case moved from the assignee to the obligor. That to suit the purposes of the obligor, and to secure to him further indulgence, the appellee agreed to endorse the paper. It is the same, therefore, as if the paper had been made, as it was, to enable the obligor to raise money, and he had thereafter raised money by delivering the note to appellant's intestate. Whatever the obligor in that event had received from the assignee would be the measure of appellee's liability as assignor. That the consideration passed before the endorsement can not affect the question unless it was shown that the assignor was misled, and thereby induced to bind himself in that way and to that extent for an antecedent debt, which he would not have done had he known the facts.

The objection of the plaintiff to the filing of the amended answer offered June 9, 1885, ought to have been sustained, and said amendment rejected.

Wherefore, the judgment is reversed and the case remanded, with directions to grant appellant a new trial, and to sustain the objection to the amended answer offered June 9, 1885, and for further proceedings consistent herewith.

R. C. Burns for appellant.

K. F. Prichard and L. T. Moore for appellee.

HOEING v. ADAMS EXPRESS CO.

(Filed March 24, 1886.)

1. Common carriers—Contract limiting liability—A contract with an express company for the transportation of property, which provides "that the company shall not be responsible for any loss resulting from any cause whatever, unless in every case the same be proved to have occurred from the

fraud or gross negligence of said express company or their servants, nor in any event shall the holder hereof demand beyond the sum of \$50, at which the article forwarded is hereby valued," is against public policy and can not be upheld.

2. Consignee presumed to be the owner—The general presumption is that the consignee is the owner of the goods consigned, and in the absence of an averment that he is not the owner it may be that the consignor could not maintain an action for their loss while in transit, but the defendant in this case waived the right to rely upon the omission of this averment by offering to confess judgment for a certain sum, and by submitting to a judgment for that amount.

3. Limitation on right to sue—The limitation in the contract sued on upon the plaintiff's right to sue unless his claim is presented in writing within thirty days can not be enforced. The failure to make a demand for the goods before suit was instituted might have authorized a judgment in bar of this suit, but not of the cause of action.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Ward.

The appellant claims that the appellee, a common carrier, received from him a package containing divers original drawings and maps of the value of \$300, which it agreed to transport to the city of New York, and there deliver to Julius Bein & Co., "but by the carelessness and negligence of defendant said package has not been delivered as agreed, and is wholly lost." The contract of shipment, or the receipt for the package given by appellee and accepted by appellant, is filed with and referred to, and made a part of the petition.

Said contract or receipt provided, among other things, as follows:

"Which [package] it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation.

"It is part of the consideration of this contract, and it is agreed that the said express company are forwarders only, and not to be held liable or responsible for any loss or damage to said property while being conveyed by the carriers to whom the same may be by said express company entrusted, or arising from the dangers of railroads, ocean or river navigation, steam,

fire in stores, depots, or in transit, leakage, breakage, or from any cause whatever unless, in every case, the same be proved to have occurred from the fraud or gross negligence of said express company or their servants; nor in any event shall the holder hereof demand beyond the sum of \$50, at which the article forwarded is hereby valued."

The appellee offered to confess judgment for \$50 and costs; it demurred to so much of the petition as sought a recovery beyond \$50, and demurred generally. On these motions the court sustained the demurrer as to all claim in excess of \$50 and costs up to the time of the offer to confess judgment, and the plaintiff failing to amend, judgment was rendered accordingly. From that this appeal is prosecuted.

The general presumption is that the consignee is the owner of the goods consigned, and in the absence of an averment that he is not the owner, it may be that the consignor could not maintain an action for their loss while in transit. But the necessity for this averment was waived in this case by the offer of the appellee to confess judgment for \$50, and the submission to a judgment for that sum. It is now too late to insist that this judgment must be affirmed, and thereby made a conclusive bar to appellant's claim, if any he has, beyond the amount adjudged.

The limitation in the contract upon the plaintiff's right to sue unless his claim is presented in writing within thirty days can not be enforced. If no demand was made for the goods or their value before the institution of the suit, this is a matter which might have authorized a judgment in bar of this suit, but not of the cause of action.

If the appellee delivered the goods to some other connecting line, which, on certain conditions named in the receipt, it had the right to do, this is matter which may be relied upon by answer.

The allegation that the goods were delivered to this company to be transported to New York, and were lost in the manner

alleged, is sufficient to show a breach. If not lost by this company, that is matter of defense.

But it is insisted that the liability of the appellee was, by the terms of the contract sued upon, limited to \$50. That a common carrier can not make a contract exonerating itself from liability arising from its own carelessness is certainly well settled law in this State. (Orndorf & Co. v. Adams Express Co., 3 Bush, 194; L., C. & L. R. R. Co. v. Hedger, 9 Bush, 645; Rhodes v. L. & N. R. R. Co., 9 Bush, 689; Adams Express Co. v. Marshall, 6 Ky. Law Rep., 291; Southern Express Co. v. Gutman, Ibid, 587 and 654.)

But it is insisted that while the carrier may not, and should not, be allowed by contract to exonerate himself from liability where loss is occasioned by his own fault or negligence, yet in such case he should be allowed to limit the amount of recovery by a stipulation that the goods are of a specified value.

We are not inclined to the opinion that the efficiency of the service to be rendered by common carriers or the fidelity of its agents can be maintained by any such radical departure from the common law liability. We can not give way to the clamor that all the dishonest, all that are disposed to overreach by dishonest or fraudulent means, are on the outside, but we must consider that those in and out are but men; that the great majority, both in and out, are honest, and that the faithfulness and honesty of those who are in can best be promoted by rules and principles which require them to select honest and faithful servants, before whom no temptation is to be placed, to take a secret advantage of a confiding public, either by acts of omission or commission. If the question of making such a departure was presented by the contract before us we should hesitate before making it, and should be controlled in the determination of that question by the effect which it would have in improving the fidelity of common carriers, more than by a disposition to inflict burdens upon the public because the carrier might be overreached by an individual shipper. The law

in its elasticity is capable of doing justice upon the merits of each case as presented by the facts, without establishing general principles, which are not only contrary to the wisdom of the ages, but are calculated to involve the trusting and confiding in the snares which may be set to entrap the dishonest. The courts are certainly as capable of taking care of the public morals by wise precedents as are carriers by unreasonable contracts.

The case of *Belger v. Dinsmore*, 51 N. Y., 166, decided by a commission, certainly makes such a departure, and upon a receipt similar in terms to the one now presented refused to allow the consignor relief beyond \$50, even upon proof of gross negligence in the carrier. Such a rule would, in our judgment, tend to produce the result referred to in 'the Orndoff case, to wit, the conversion of the goods by the carrier whenever of greater value than that named in the receipt. Neither can we follow that case in the idea that this is a contract whereby the shipper has agreed that in case the goods are lost by the carelessness of the express company that he will not claim more than \$50. It is a contract, if one at all, whereby it is agreed that the appellee is not to be responsible for any loss or damage, * * * from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said express company or their servants, nor in any event for more than \$50. All events but one, fraud or gross negligence in the carrier being excluded, the words "nor in any event" are entitled to no other meaning than "in that event" only for \$50. Not only that, but that event must be proved by the consignor. Under this contract, construed according to all rules of construction known to us, the consignor could not recover unless he could prove fraud or gross negligence, and not then beyond \$50. Such a contract is against public policy, and can not be upheld.

If the parties understandingly had agreed that the carrier was to be liable for the value of the goods, but not to exceed the sum of \$50, if lost while in his possession, unless the loss was occasioned by the act of God or the public enemy, and

then not at all, then there would have been a contract which recognized the common law liability and limited the recovery to an agreed sum, but this was not the scope or effect of this contract, and to so hold is not to construe, but to make a contract.

This contract is not like the one in *Hart v. Pennsylvania R. Co.*, 112 U. S., 332. In that case the contract was:

“The carrier assumes a liability on the stock to the extent of the following agreed valuation.”

Then follows the agreed values; then follows conditions exempting the carrier from injuries occasioned by the animals to each other, or resulting from their own condition, etc.

In that case the common law liability of the carrier to the full extent of the agreed value was admitted, and there was nothing for the plaintiff to prove except the loss. But the effect here is to force the public to accept a contract which requires the consignor to make out a much stronger case, and when that is done to limit the recovery.

The judgment is reversed and the case remanded, with directions to set aside the judgment and overrule the demurrers and for further proceedings.

D. G. Falconer for appellant.

Breckinridge & Shelby for appellee.

PEDIGO & WARDER v. DAY & ALLEN.

(Filed February 24, 1886.)

Agency—Violation of authority—Where an agency to do a particular act is created, and it is to be done by one who has not been held out by the principal as having authority and whose business itself does not imply authority, restrictions and limitations given along with the authority form part of it, and the principal is not bound except by acts within the restrictions and limitations.

Where an agent to sell a horse for a certain price sold for less the title did not pass, the restrictions as to price being a part of the authority to sell and a limitation on it.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Bowden.

Maynard hired a horse on Saturday morning from the appellants at Glasgow, Barren county, to ride to a place in that

county nine or ten miles from Glasgow, and to be returned the following Monday morning. He rode the horse to Hartsville, Tenn., and there sold the horse, bridle and saddle to the appellees for \$85. Maynard told them the horse was not his, but "that he had the right to sell the horse if the price was suitable, and that the price was \$100—\$100 if the horse was all right, but that the horse was lame and in a bad fix and he would take \$85 for horse, bridle and saddle." The horse was a little lame and sore in his feet, got well in a few days, but was unfit for work several days after the appellees got it.

That was substantially the evidence before the jury on an action by the appellees, who had surrendered the horse to the appellants on their alleged claim that it had been stolen from them by Maynard. The court gave this instruction:

"If the jury believe from a preponderance of the evidence that defendant Warder, as a member of the firm of Pedigo & Warder, hired the horse sued for to Maynard, and delivered the same to him and gave him authority to sell the horse and return to them the money instead of the horse; and if Maynard, while so in possession of the horse sold him to plaintiffs and they paid him for him, and if defendants, or either of them, afterwards took the horse wrongfully out of plaintiffs' possession, and had so kept him or sold him away from them till this suit was brought, they should find for plaintiffs the value of the horse at the time he was so taken from them."

And the court refused to instruct the jury that though Warder authorized Maynard to sell the horse for \$100, a sale for less than \$100 did not pass the title.

There was no evidence from which the jury could have inferred that Maynard was authorized to sell except on the condition that he could get \$100 for it. To this point only three witnesses testified. Scott and Smith, for the appellees, stated what Warder said before the grand jury. Warder's statement, according to Smith, was that "Maynard asked if he could sell him for \$100 if he should do so, and Warder said yes, if you can sell him for \$100 you may do so, but you must either

bring me the horse or \$100;" according to Scott, "Maynard asked the price and was told \$100; he then asked if he might sell him for that price if he could get it, and Warder told him yes; that he might sell the horse for \$100 or return the horse." Warder testified that being told the price, "Maynard then asked if he could sell the horse for \$100 should he do so, when witness replied yes; you can bring me back \$100 or my horse by Monday morning."

This was not an authority to sell the horse with a personal instruction as to the price, but the authority to sell was made dependent on Maynard's ability to get the price fixed; it was an authority to sell on that condition only. One dealing with an agent whose powers he knows are limited deals at his own peril, whether the limitation be as to the extent of the power or the mode of its execution. (*Craycraft v. Selvage*, 10 Bush, 709.) One of the appellees testified that Maynard told him that he was not the owner, but that "he had the right to sell the horse if the price was suitable, and that the price was \$100;" but that he would take \$85, not because that was the price, but because the horse was "lame and in a bad fix." From this evidence the jury might have inferred a direct notice to the appellees that the right to sell was given to Maynard by the owner "if" he could get \$100, and that his act of selling for \$85 was not in conformity to his authority, but in violation of it.

The instruction permitted the plaintiffs to recover although they may have had actual notice that Maynard had no right to sell for less than \$100. There was certainly evidence from which the jury could have found they had such notice.

Where one employed another to sell his horse and instructed him to get all he could, but not to sell for less than \$100, it was held that, as the instructions were manifestly not intended to be made public, the title passed; but it was conceded that if the instruction had been to sell for \$100, it should have been regarded as part and parcel of the authority to sell and a limitation on it. (*Hatch v. Taylor*, 10 N. H., 538; *Red. & Her. Story on Agency*, section 73, note 1.) Where the agency is to

do a particular act, and it is to be done by one who has not been held out by the principal as having authority, and whose business itself does not imply authority, restrictions and limitations given along with the authority form part of it; and the principal is not bound except by acts within the restrictions and limitations. It is otherwise when the authority is distinct and not derived from the instructions given. If, for example, the appellants had given Maynard a written authority to sell the horse, fixing no price, they would have been bound, though they had given separate instructions, whether oral or written.

The appellants had not held out Maynard as authorized to sell; they gave him no authority separate from the restriction as to price; that restriction was part of his authority and a limitation on it, and he could not pass the title of appellants unless he acted within that limitation; and this would be true though the appellees had had no notice of the restriction as to price.

One who buys a stolen horse and pays the thief loses his money, so he loses who buys a hired horse and pays the baliee. If he buys from one claiming to be an agent with power to sell, he trusts entirely to the declarant, and loses his money if there was no power to sell; and so if he trusts the declarant, and it turns out that he had no authority to do the exact thing he does, though he may have had authority of a more limited nature, he deals at his peril.

The judgment is reversed and the cause is remanded, with directions to grant the appellants a new trial.

Boles & Duff, W. P. D. Bush and F. F. Bush for appellants.
J. W. Jones and J. J. Reynolds for appellees.

MERRICK, &c. v. HOLT.

(Filed April 12, 1885.)

New trial—Remission of part of verdict—When the jury has found a verdict justified by both the evidence and the instructions, and the complaint

is that there was an error in giving instructions. there may be a remission that will cure the error of the court in giving the instruction which produced the excess in damages if it can be shown how much of the damages must be attributed to the error of the court, but when the verdict is so flagrantly against the evidence as to indicate passion or prejudice the court can not refuse a new trial because he who has the verdict remits as much of it as, in the opinion of the court, ought not to have been found.

Appeal from Jefferson Court Common Pleas.

Opinion of the court by Judge Bowden.

The motion of the appellee to strike the bill of exceptions from the record must be overruled. If it were true that the instructions are not part of the bill, or made part of the record by order of court, that would be no reason for sustaining the motion, though it would deprive the bill of all value depending on the fact of the instructions being before the court. But the instructions are incorporated in the bill as presented here, which shows that they are all that were asked, given or refused.

Pending the motion for a new trial made by the plaintiffs, who are the appellants, the court notified the defendant that a new trial would be granted if he would not consent to remit all of his judgment on his set-off except five dollars, the judgment being for \$250. The defendant accepted the terms, and the motion was overruled.

If the appellants were not entitled to a new trial on their motion the order resulting in the remission of \$245 was beneficial to them, and they could not complain of an injury inflicted on their adversary. But that the verdict was flagrantly wrong seems to have been promptly admitted by Holt, who voluntarily remitted all of the \$513.16 found by the jury except \$250 before the motion for a new trial was made; and that this sum was excessive was in effect decided by the court in requiring a remission of all of it except \$5 on pain of granting a new trial.

Masterson v. Hogan, 17 B. M., 325, was an action for mesne profits, in which the verdict was for \$4,118, all of which except \$2,778.66½ was remitted. The excessive verdict was the:

result of an erroneous instruction as to the time for which damages might be assessed, and it was claimed that the error in the instruction was cured by the remission of damages representing the value of the use of the land during the time for which the plaintiff had no right to recover. It was declared by the court that "when a plaintiff, having a verdict for flagrantly excessive damages, produced by erroneous instructions in his favor, undertakes to cure the error by remitting the excess, he is bound to remit so much that the remainder shall not only be no more than upon the law and evidence the jury might justly have found, but shall be certainly no more than the verdict itself proves him to be entitled to by the principles of law applicable to the case." In such case, in order to escape the effect of the erroneous instruction, it rests on the plaintiff to show affirmatively that what remains of the verdict might properly have been found by the jury under proper instructions; and that, under the principles of law applicable to the case, the verdict actually rendered proves that it would have been for such remainder. The principle seems to be that when the jury has acted deliberately on the facts, and has found a verdict justified by both the evidence and the instructions, there may be a remission that will cure the error of the court in giving the instruction which produced the excess in damages whenever it can be definitely shown how much of the damages must be attributed to the error of the court; and that it lies on the party claiming under the verdict to make this showing.

But when the objection is that the jury have not acted on the evidence with deliberation, but have returned a verdict so flagrantly against it as to indicate that degree of indifference to the right of the parties and the justice of the case as not only confers power on the court to set it aside, but makes it a duty to do so, in order that the person so sinned against may have his case tried by a fair, serious and impartial jury, the court can not refuse a new trial because he who has the verdict remits so much of it as in the opinion of the court ought not to have been found, rather than take the risk of a second trial

by men who will not be controlled by passion or prejudice. In such a case the objection to the verdict goes to the conduct of the jury, and imputes an indisposition to treat the objector's case with the calm consideration which the ends of justice demand. The entire verdict is impeached as the product of a spirit that infuses into every part of it the taint of positive wrong or of reckless indifference. It may be that the proof of its prevalence can be found most readily in the excessive amount of damages; but when by that or other manifestation its existence is sufficiently shown, it is not seemly to compel the injured party to submit a verdict so brought forth. It is known that in the matter of amount merely the jury were improperly influenced, and it can not be known that the same spirit did not rule in regard to other matters involved. As to them the principle of *Masterson's* case would require the common rule to be reversed, the verdict could no longer be maintained by the rule of deference usually applied, but he who, conceding that as to one matter it is flagrantly opposed to the evidence, yet asks to have it upheld as to other matters and issues, about which the evidence is conflicting, must be content to have the court look into the matter, and to see that the law and evidence clearly sustain the verdict as it stands after excising that which is confessed to be wrong. Tested by this rule, if it is applicable, there should have been a new trial. But we do not think it applies in cases like this, because every party is entitled in jury cases to have all the issues tried by a jury whose verdict does not convict them of having been governed by prejudice and passion.

Brown v. Morris, 3 Bush, 82, rests on this ground. The court would not inquire to see if the evidence was such as to sustain a verdict for \$1,000, the remainder of the verdict for \$4,000; but declared that the court, by requiring the remission of \$3,000 on pain of granting a new trial, virtually assessed the damages, and thereby deprived each party of his right to an assessment by a jury; and that this act was an error prejudicial to the appellant if he was entitled to a new trial. In

this case it must be conceded that the appellants were entitled to a new trial, whether the verdict as returned or as modified by the first remission be regarded, and that was the opinion of the lower court.

The judgment is reversed and the case is remanded, with directions to grant the appellants a new trial and for further proceedings.

E. F. Trabue for appellants.

Goodloe & Roberts for appellant.

SLACK v. LONGSHAW.

(Filed June 19, 1886.)

1. Negotiable instruments—Presentment and notice—The drawer of a bill will not be permitted to defend on the ground that there was no demand or notice of protest, if he had no right to expect the bill to be paid and the mere fact that he provided no funds to meet the bill is *prima facie* sufficient to show that he had no such right. But even in that case the endorser is entitled to strict demand and notice, unless he has participated in the fraud of the drawer.

2. When the endorsee and drawee of a bill payable on demand reside in different places the bill must be forwarded by the regular post of the day after it is received.

3. The fact that the holder has no established relation with any bank or individual in the place where the bill is payable does not give him the right to protract the time by sending the bill to an agent residing in another place to be forwarded to the place of payment.

4. Where the bill is remitted by the holder to the place of payment the agent at that place may send notices to the holder to be served by him on those he desires to hold responsible, but where the holder establishes intermediate agents for the sole purpose of forwarding to some other agent who is to make the demand he can not claim a day's delay at each place where he has a forwarding agent in order to give that agent opportunity to notify the next in order that the bill has been protested.

5. The law requires immediate presentment and notice as conditions precedent to the fixed liability of an endorser, and where there has been delay it is not necessary for him to show as matter of fact that he was injured thereby.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Bowden.

On a former appeal in this case to the Court of Appeals it was held that the original petition did not show a cause of

action against Slack as endorser of the bill, which was payable on demand. The bill was negotiated in Elizabethtown July 3; was drawn on Duckworth, Kable & Co., of Cincinnati, and was not presented till July 8. The decision was that this delay of five days, not excused, released Slack. Casual reference was also made to the fact that it was not alleged that there were no funds in the hands of the drawee.

When the action is against the drawee he will not be permitted to defend on the ground that there was no demand or notice of protest, if he had no right to require or expect the bill to be paid; and it seems that the mere fact that he had no funds, and that none were provided to meet the bill, is *prima facie* sufficient to show that he had no such right. (2 Daniel on Negotiable Instruments, section 1074.) But even in that case the endorser is entitled to strict demand and notice unless he has participated in the fraud of the drawer. (Ibid, section 1083.) There is no intimation in this case that Slack did not have confidence that the bill had been or would be provided for. He was, therefore, not precluded from requiring the appellee to show such demand and notice as the law makes necessary.

A bill payable on demand is not regarded as a continuing security, but as contemplating immediate payment; and when the endorsee and drawee reside in different places the bill must be forwarded by the regular post of the day after they are received. (1 Daniel's Negotiable Instruments, section 605; 1 Am. Law Cases, 359.)

The excuse pleaded and relied on in evidence in this case was that Longshaw got the bill on the evening of July 3, and forwarded it by the next mail to a bank in Louisville for collection, having no correspondent in Cincinnati; as the next day was a holiday that bank did not forward it to its correspondent in Cincinnati till July 5, and that the mail, being delayed by a railroad accident, did not reach Cincinnati in time to make demand on the 6th, on which day the bill was received; and the 7th being Sunday, the demand was not made till next day. The railroad accident will be entirely eliminated

if the bill would have reached Cincinnati before it occurred if it had been forwarded directly to that place, and if the appellee did not have the right to delay by sending to Louisville. That it would have reached Cincinnati if it had been sent directly to that city in time to have made demand on the 5th there can be no doubt. We have been referred to no case, and we have not found any, in which it has been held that if the holder has not established relation with any bank or individual in the place where the bill is payable, he may protract the time by sending the bill to an agent residing in another and distant place. Such a rule seems inconsistent with the spirit of mercantile law making the rights of the endorser to depend on the private fact of the holders having or not having an agent where the demand is to be made, instead of depending on the public fact as to facilities of transmission by mail. The facts did not constitute an excuse for the delay which the decision of the Court of Appeals has pronounced to be fatal to the right to recover.

The notice of protest was not given to Slack till July 11, according to the appellee's evidence. The intervention of the Louisville bank caused not only delay in making demand, but also in giving notice of protest. The Cincinnati bank mailed the notice to the Louisville bank, and it mailed them to Longshaw, who served notice on Slack. No doubt where a bill is remitted by the holder to the place of payment the agent at that place may send notices to the holder to be served by him on those he desires to hold responsible (*Farmers & Mechanics Bank v. Turner*, 2 Litt., 13; *Smith v. Roach's Ex'or*, 2 Ben Monroe, 17); but it is quite a different matter when the holder establishes intermediate agents for the sole purpose of forwarding to some other agent who is to make the demand, and claiming a day's delay at each place where he has a forwarding agent in order to give that agent opportunity to notify the next in order that the bill has been protested.

But for this intermediate agent Slack could and should have had notice several days before he received it.

Nor is it material to show that as matter of fact he was injured by the delay. The law requires presentment and notice as conditions precedent to the fixed liability of an endorser, not merely as an indemnity against actual injury, but as security against a possible injury which might result from the holder's laches. (2 Daniel's Negotiable Instruments, section 1170.)

The instructions permitted a recovery which the rules here recognized do not permit.

The judgment is reversed and the case is remanded, with directions to grant the appellant a new trial.

Presiding Judge Richards dissenting.

James Montgomery for appellant.

Montgomery & Poston for appellee.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY.
CO v. PEMBERTON, BY, &c.

(Filed March 26, 1886.)

1. Infants—Loss of service—Release by mother—The mother of a bastard is entitled to his services until he becomes twenty-one years of age, and any loss of his services during infancy is an injury to her for which she, if any one, has the right to sue; and while she may so emancipate her son as to entitle him to sue therefor, provided she has not parted with her right, she can not confer upon him that right after she has bartered it away.

2. Negligence—Pleading—In actions to recover for personal injuries resulting from negligence it is sufficient for the plaintiff to allege, in general terms, that the injury complained of was occasioned by the carelessness and negligence of the defendant, and if the petition goes further and states the circumstances accompanying the infliction of the injury, the defendant is not required to deny them.

3. Practice—Suit by next friend—The Code requires a next friend to file his affidavit showing his right to sue in that capacity, but where the defendant moves to dismiss the petition for a noncompliance with this provision it is not error in the court to permit the proper affidavit to be then filed and the action to proceed.

4. Right to sue in form a pauperis—A next friend is authorized in a proper case to sue in forma pauperis, and the court has the right to so direct even after a motion has been entered to require security for costs.

Appeal from Scott Circuit court.

Opinion of the court by Judge Richards.

This was an action by an infant through his next friend against a railroad corporation to recover damages for personal injuries alleged to have been caused by the defendant's negligence. A trial having resulted in a verdict and judgment for \$2,500 against the company, this appeal is prosecuted to reverse it.

1st. The Code requires a next friend to file his affidavit showing his right to sue in that capacity, but where the defendant moves to dismiss the petition for a noncompliance with this provision it is not error in the court to permit the proper affidavit to be then filed and the action to proceed.

2d. The next friend is authorized in a proper case to sue in forma pauperis, and the court has the right so to direct, even after a motion has been entered to require security for costs.

3d. The company had entered into a contract with the infant by which it paid him \$60 in full satisfaction for the injuries sustained. The appellant now insists that the infant had no right to sue before disaffirming this contract (which it is contended he would not do until he arrived at age), and returning the \$60.

Although some courts have held the contrary, it is the established rule in this State, and it accords with the weight of authority elsewhere, that an infant, as to his executed and voidable contracts for personal property and rights, may, during his infancy, exercise the power of rescission. (Bailey v. Burnberger, 11 Ben Monroe, 114.)

Nor is it always the case that an infant must restore the consideration received under such contracts before asserting his rights in court against the opposite party. (Petty v. Roberts, 7 Bush, 418.) Whenever the allegation is that he has been induced to sell a right for much less than its real value, he may sue for the sum he was in fact entitled to and credit thereon the amount he has received. (Middleton v. Hoge, 5 Bush, 491.) In such cases the defendant could elect to restore the

thing purchased, if the transaction be susceptible of such a course, instead of paying the estimated value; but this right of election does not exist where the infant has simply accepted an agreed sum of money in satisfaction of his right to sue for a larger amount.

4th. The infant was a bastard, who sued through his mother as next friend. He was at the time of the accident about eighteen years of age. She was entitled to his services until he became twenty-one years old. Any loss of services during infancy was an injury to her for which she, if any one, had the right to demand compensation from the company. It is true she could so emancipate her son as to entitle him to sue for the loss of services during his minority, provided she had not already parted with her right in some other manner. In the case at bar she had joined in the written contract under which the \$60 was paid her son, and covenanted in consideration thereof to release to the company all of her claims "growing out of or in any manner connected with said injury." Having done this she could not thereafter confer upon her son any right she had bartered away. It makes no difference that the money paid under this contract was received by the son, she having parted with her interest in consideration that the money should be so paid. It was, therefore, error in the court to tell the jury, without qualification, that they could consider the loss of time and present inability to labor in estimating the plaintiff's damages.

5th. The petition alleged that the plaintiff "was thrown, on the 10th of June, 1883, through the careless and negligent act of the defendant, through its agents and servants, who were in charge of said train—said act consisting in said agents and servants suddenly and without signal or warning to the plaintiff putting the standing train, on which the plaintiff was standing, in motion—onto the track of said road, whereby one of the cars of said train passed over the leg of the plaintiff, crushing and mangling it."

To this the defendant interposed the following denial: "Denies that on the 10th day of said month of said year, or at any other time, said plaintiff, was, through the careless and negligent act of defendant, thrown onto the track of said road, whereby one of the cars of said work train passed over the leg of plaintiff."

In a second paragraph of the petition it was alleged that "the defendant, by its agents and servants in charge of said train, by its gross and inexcusable carelessness and negligence in suddenly putting said train in motion, without signal or warning being given of their intention so to do, caused the plaintiff to be precipitated from said train onto the track of said road, whereby one of the cars of said train passed over the plaintiff's leg, crushing it."

To this the defendant answered denying that it, "by its gross and inexcusable carelessness and negligence, caused the plaintiff to be precipitated from said work train on to the track of defendant's road, whereby one of the cars of said train passed over the plaintiff's leg, crushing it."

The question is whether the defendant has admitted the act of suddenly putting the train in motion without signal or warning, by failing to specifically deny it. Its solution will depend upon whether it was necessary for the plaintiff to aver the fact, or whether it was one to have been established in the evidence alone.

"In actions for personal injuries resulting from negligence it has always been regarded as sufficient for the plaintiff to allege, in general terms, that the injury complained of was occasioned by the carelessness and negligence of the defendant. He has not been required to state the circumstances with which the infliction of the injury was accompanied in order to show that it had been occasioned by negligence. An allegation of the extent of the injury and of the manner in which it was inflicted has been always regarded as sufficient." (Chiles v. Drake, 2 Met., 149.) In that case it was held to be sufficient to

allege that the defendant, "by means of his willful neglect, shot and killed her said husband, to her great damage, etc." So in the case at bar the petition would have been good had it simply alleged that the defendant, by its carelessness and negligence, caused the plaintiff to be precipitated from said train to the ground, whereby the car passed over his leg, to his damage, etc. Having gone beyond this and stated details unnecessary to the validity of the pleading, the defendant was not bound to deny them.

But this question has been passed upon by the Court of Appeals in *L. & N. R. R. Co. v. Wolfe*, 3 Ky. Law Rep., 576. There the plea was contributory negligence, and the evidence the pleader intended to rely on to establish it was stated. The plaintiff simply denied "that he was guilty of any negligence at or before the time of the injury complained of in his petition, or that he contributed in any way by his negligence to the occurrence of said injury." The court said: "Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises or by which contributory negligence is made out. It is the absence of care in the performance of an act and is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally." The denials above quoted were there held to be good, and we are of the same opinion about those in the case at bar. Having come to this conclusion, it follows that the lower court erred in its first question propounded to the jury, wherein it assumes that the company put the train in motion without proper signals. The evidence was contradictory upon this point, and it not being concluded by the pleadings the jury should have been permitted to pass upon it. (*K. C. R. R. Co. v. Thomas*, 79 Ky., 173.)

For these reasons the judgment is reversed and the cause remanded for further proceedings.

C. B. Simrall and J. E. Cantrill for appellant.

Wm. Lindsay for appellee.

September, 1886—4

PEPPER v. DONNELLY.

(Filed June 16, 1886.)

Bar—Judgment dismissing petition—Where a judgment dismissing a petition is pleaded in bar of a subsequent action, and the record in which the judgment was rendered shows that it was rendered after testimony was heard and after the demurrer to the petition and answer had been overruled, the court can not presume that the petition was dismissed because it did not state a cause of action, but must rather presume that the judgment was upon the merits, and held it to be a bar.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Ward.

This case is a complicated one in law and fact, and it will be helpful to its consideration and determination to state in chronological order the important and controlling facts connected therewith.

October 31, 1876, L. J. Blakely was appointed administrator of John Pepper, deceased, and Charles Donnelly was his surety.

January 17, 1878, Blakely instituted a suit in the Kenton Chancery Court to have the estate settled, and for directions as to how he should distribute it.

June 26, 1879, Blakely appeared before the county court, and on his motion was allowed to give a new bond with E. H. Brandts as surety. This bond, beside the usual covenants in administrators' bonds, provided that "Blakely will indemnify Charles Donnelly, his former surety, against all loss, costs or damages legally incurred by reason of said suretyship." The order of the county court made upon its execution stated: "Charles Donnelly is discharged on his bond as such."

November 8, 1880, a judgment was rendered in the suit instituted by Blakely by which it was determined that he had in his hands as administrator \$2,749.29, and he was ordered to pay that sum to the master commissioner of that court. He failed to pay.

December 5, 1880, Helm, commissioner, and William Pepper instituted a suit at law against Blakely and Donnelly, upon the bond executed by them as above stated, to recover the ad-

judged balance in the hands of the administrator. In that suit it was not alleged that William Pepper was the heir of John Pepper; it was alleged that it had been determined in the former suit that he was the sole heir. Donnelly filed a general and special demurrer, the general demurrer was overruled, the special demurrer was sustained, because Helm was a party, and the petition dismissed as to any claim made by him.

January 3, 1881, Donnelly answered. The only defense relied upon by him was the execution of the new bond by Blakely with Brandts as surety as hereinbefore recited. To that answer there was a general demurrer, which was overruled, and then there was a reply. This reply did not traverse any material fact relied upon in the answer, but denied the legal effect claimed to arise from the facts plead in defense of the action. To this reply there was a demurrer, pending that this order was made January 25, 1881: "By agreement of the plaintiff and defendant, Donnelly, the law and facts upon the issue between them are submitted to the court."

January 28, 1881, this order was made: "The court having heard the testimony, it is adjudged that the petition herein be dismissed as to defendant Donnelly." * * * From this judgment, after a motion for a new trial had been overruled and a bill of exceptions made and allowed, an appeal was prayed and granted.

March 30, 1881, Pepper instituted suit against Brandts, as the surety of Blakely, alleging the facts as to the first and second bond as hereinbefore stated, and claiming that Brandts was bound for the amount ascertained to be in the hands of the administrator.

December 3, 1883, the judgment dismissing the action as to Donnelly was affirmed by this court.

April 1, 1884, Helm, master commissioner, and William Pepper filed an amended petition in the suit instituted against Brandts, making Donnelly a party and seeking to make him liable for the amount due by the administrator. This petition cured certain defects which this court said there were in the

petition first filed against Donnelly, and on account of which it said Donnelly's general demurrer thereto ought to have been sustained.

To this amended petition Donnelly plead in bar the former judgment in his behalf, and that plea was adjudged good and the petition dismissed as to him, and from that judgment this appeal is prosecuted.

The sole question presented by this appeal is the effect to be given to the judgment of January 28, 1881.

The proposition contended for by counsel for appellant is correct, to wit: That there must have been a trial upon the merits of the controversy or issue joined between the parties before the judgment can be plead in bar of another suit. In view of this admitted rule it may be doubtful whether the answer of the appellee was sufficient, since it did not allege that the parties had plead to an issue, or that the case had been determined upon the merits. But there was no demurrer, but a reply, and that being held insufficient there were five amended replies offered and rejected.

These various amended replies in effect deny that there was an issue formed upon the merits of the action, and place the judgment upon the ground that the petition did not state a cause of action, and that, therefore, there could have been no issue and no trial on the merits. The record of the original suit is made a part of the reply.

If there was a defect in the answer in this case it has been so far cured by the reply and the exhibits filed therewith as to enable this court to look at that record and determine from it what effect is to be given to the judgment.

The effect of the judgment is to be determined by the record of that case. In exceptional cases evidence may be heard to illustrate, but never to contradict, the record of the principal case. Whether any fact could be proven to assist the court in deciding what matters were passed upon at the trial resulting in the judgment in question we need not consider because there is no allegation that the record does not show all that

occurred. Nor do we well perceive how any allegation could be made that it does not, unless it was as to the mental process by which the judge arrived at his conclusions, or the basis upon which he founded the judgment. There was a time when his conclusions of law and fact could have been made a matter of record, but that time having passed they can not now be known or established in any way, and we can now look at the record alone to ascertain whether the case was considered on its merits and so decided, or whether dismissed on technical grounds, or as to the sufficiency of the petition to set out a cause of action.

In view of the history of this litigation, as hereinbefore stated, we do not see how there can be any reasonable doubt that the circuit judge decided the case upon its merits on the defense presented by the answer. The petition was adjudged good; the answer was adjudged good; it may have been that the court thought the reply denied issuable facts, or it may have been regarded as presenting in but another form the legal value of the allegations of the answer and thus making, as the demurrer to the answer did, an issue of law. But beyond all the order shows, and the bill of exceptions show, that evidence was heard, and after that the judgment. One of two things is legally certain. The case was heard upon its merits, or the action was dismissed because the petition was adjudged insufficient.

This court can not presume that circuit court would, after twice deciding that there was a cause of action, decide on final hearing that there was not, and without notice to the plaintiff, or without anything in the order to show that it was so held, but on the contrary with much to show it was not so held, dismiss the petition because it did not state a cause of action. If on the former appeal this court had been of the opinion that the petition had been dismissed for such cause, and under such circumstances, it would most certainly have reversed the judgment. On the contrary, this court on the former appeal held that there was an issue joined, which the court tried, and that this court could not reverse the action of the circuit court be-

cause there was nothing in the record to show upon what conclusions of law or fact the judgment was based, or that there was an exception taken as to the action of the court on any questions of law arising on the trial. Why should this court have gone into that question at all if it had been of opinion that there was no issue? It waived a consideration of the legal question because there was nothing to show an exception on the trial. Attention does not seem to have been called to, or if so there was no consideration of, the exception to the action of the court in overruling the demurrer to the answer.

This case is not like that of *Bracken County v. Robertson County*, 6 Bush, 69. There the court decided that the judgment of the circuit court was erroneous on the main question in the case, but as it appeared that the plaintiff had no right to sue at all the judgment dismissing his petition was right, and that dismissal would not prevent the proper party from suing. But in the appeal inserted herein the court said Pepper had not alleged he was the heir, and, therefore, he had not shown the right to sue, but it did not say that the judgment was wrong against him or would not be a bar if he was the heir and had the right to sue. Nor is the case like that of *Thomas v. Hite*, 5 Ben Mon., 590. There a judgment at law was plead in bar of a suit about the same matter pending in equity, and was adjudged good, and the equitable action dismissed. Afterwards the judgment at law was reversed and remanded for a new trial, and then the judgment in equity was plead in bar, and the question arose whether the equitable action was dismissed on its merits or on account of the judgment plead in bar which had been afterwards reversed, and on the trial it was determined that the equitable action had not been tried on its merits, and, therefore, the judgment in that case was not a bar, since it had been rendered not upon the merits, but because of a judgment plead in bar, which was afterwards reversed.

Here the plaintiff might have sued the obligors on both bonds in one action so as to have it determined at one and the same time which was bound, or if both were bound, to

what extent. He did not do that; if the court should release one because he was not bound, and then release the other because he was not bound for all, it would be a misfortune resulting from conflicting judgments rendered in separate actions against separate parties. The latter judgment would in no way affect the conclusiveness of the judgment in favor of the one first sued.

The judgment is affirmed.

W. K. Benton for appellant.

McKee & Finnell for appellee.

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KENTUCKY COURT OF APPEALS.

TRIMBLE v. REDMAN, &c.

(Filed March 25, 1880—Not to be reported.)

1. Husband and wife—Wife's right to settlement—It is only when the creditor of the husband undertakes to subject property of the wife to which the husband has not perfected his legal right that the wife may interpose to claim a settlement.

2. Marriage gives to the husband the right to the use of the land of the wife, and where they reside upon her land and it is cultivated by or under the control of the husband the produce belongs to him and not to her. Therefore, the wife is not entitled to a settlement out of the proceeds of such produce.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Cofer.

Marriage gives to the husband the right to the use of the land of the wife, and where they reside upon her land and it is cultivated by or under the control of the husband the produce belongs to him and not to her.

Creditors of the husband have no right to insist that he shall exercise his right and claim the use of his wife's land, but if he does so the use becomes his, and the produce of the land is in no sense the property of the wife. She has no more right to the produce raised by the husband upon her general estate than she would have to hogs or cattle, or wheat purchased by him with her money, previously reduced to his possession, in the exercise of his marital right.

It is only when the creditor of the husband undertakes to subject property of the wife, to which the husband has not perfected his legal right, that the wife may interpose to claim a settlement.

The error in the argument of counsel consists in the assumption that the husband's legal right to the wheat was incomplete, and, therefore, that the debt for the price is her chose in action.

If the wheat had not been sold by the husband *Myall v. Moreland*, 14 Bush, —, would be authority for holding that it was subject to seizure under an execution against the husband, and it certainly can not be maintained that if the wheat was subject to sale under execution against him that he has not a legal title to the price.

It is only when the legal right of the husband has not been perfected that the chancellor can intervene to protect the wife against the claim of his creditors. That is not the case here, and however much the court may sympathize with the wife and children of an insolvent husband and father, we can do nothing less or more than to declare the law as we find it.

Judgment reversed and cause remanded, with directions to render judgment subjecting the sum in contest to the satisfaction of appellant's debt.

A. Perrin for appellant.

J. Q. Ward for appellees.

ROSE v. TAYLOR'S EX'OR, &c.

(Filed March 6, 1880—Not to be reported.)

1. Judicial sales—Exceptions to commissioner's report—It is not the duty of the court to set aside a judicial sale, however irregular, unless exceptions to the report of sale are filed.

2. The time that reports of sale shall lie over for exceptions is not prescribed, and where a report was filed on the third day of the month and not confirmed until the fifth, the court holds that the time allowed was sufficient.

3. Where there has been a decretal sale of land for debt the court has no right to presume that the right of redemption does not exist, and is bound to investigate that question before ordering a conveyance or a writ of possession.

Appeal from Mercer Common Pleas Court.

Opinion of the court by Judge Cofer.

In October, 1878, the appellant filed in this court an appeal from a judgment of the Common Pleas Court of Mercer county directing a tract of land to be sold to pay a debt due to the executor of James Taylor.

The judgment was not superseded, and in November, 1878, the commissioner sold the land. He lodged his report of the sale in the clerk's office January 29, 1879, and on the 3d of February it was filed in court. On the 5th of February, there being no exceptions thereto, the report was confirmed and a deed ordered to be made to the purchaser. On the 11th a deed was presented to the court and examined, and ordered to be certified to the proper office for record.

On the 12th a writ of possession was awarded the purchaser.

The appellant not only failed to file exceptions to the report of sale, or to make any objections to the order directing a deed to be made, the order approving the deed or the order awarding a writ of possession, but he failed to except to any of these orders, or, as far as appears, to give to the court the slightest intimation that he objected to anything that was being done, or that an appeal from the order of sale was pending in this court. Nor did he afterward move the court to set any of these orders aside.

Counsel now complains that 131 acres of land, for which his client agreed to pay \$35 per acre, on which he has paid \$800, and made improvements worth \$1,000, and which was valued at \$20 per acre by appraisers appointed under the act of 1878 (Acts 1878, volume 1, page 122), has been purchased by the executor of the vendor at \$5 per acre, and insists that it was the duty of the court below to set aside the sale without exceptions, or, as far as appears, even a suggestion by any one that the sale was for an inadequate price or that the appellant desired to have it set aside, and counsel now asks this court to reverse the order confirming the sale on the ground that the price was grossly inadequate. It is true he argues the additional ground that the order confirming the report was made

on the same day the report was filed, and that no time was allowed to file exceptions. But, as we have already stated, the record shows the report was filed in court on the 3d and was not confirmed until the 5th day of February. The present Code does not prescribe the time that such reports shall lie over for exceptions, and we are not prepared to decide that the time allowed in this case was not sufficient.

Nor can we concur with counsel that it was the duty of the court unasked to set aside the sale. It is not the practice and not the duty of the courts to take up each report of sale and scrutinize it, and compare it with the record, and see that it is such a sale as should be confirmed. That is the duty of the parties or their counsel, and when no objection is made the court has a right to presume that the report ought to be confirmed, and that the parties do not desire to have the sale set aside, or that they have no sufficient grounds upon which to ask that it be set aside.

If the appellant has suffered loss it is the result of his own negligence, and we have no power to relieve him.

If he had filed exceptions and suggested to the court that an appeal from the order of sale was pending, it would have been the duty of the court to suspend action upon the report until the appeal was decided, or if the exceptions were well taken, to sustain them and set aside the sale.

None of the cases cited by counsel conflict in any way with the conclusion reached above, that it was not the duty of the court, without exceptions, to look into the report and the record, and to set aside the sale, however grossly inadequate the price may have been.

The first case cited (*Bolware v. Bolware*, 4 Litt., 256) was a subject to adjust the accounts between partners. A commissioner's report of settlement was filed and the court, on final hearing, quashed the report and dismissed the bill, and this court held such action correct, although there were no exceptions, because the report was on its face vague and uncertain,

and because it appeared that the defendants were about to file exceptions and were prevented from doing so by the court, "who decided that it would hear and determine the validity of the objections to the report on the hearing of the cause."

In *Miller v. Hall*, 1 Bush, 229, the sale was set aside, but certainly not without motion or objection by the parties interested.

In *Clary v. Marshall*, 4 Dana, 99, there was no sale or report by a commissioner, and the case has no bearing upon the case in hand. Nor has *Debell v. Foxworthy's Heirs*, 9 B. Monroe, 228; nor *Clark v. Farrow*, 10 B. Monroe, 446.

The act of 1878 (1 Acts, 122) provides (section 3) that when the right of redemption exists the defendant shall remain in possession, and that the land shall not be conveyed until the time for redemption expires.

The court had no right to presume that the right of exemption (redemption) did not exist, and was bound to investigate that question before ordering a conveyance or a writ of possession, and as the order for the writ of possession is a final order, it and the order directing a deed to be made must be reversed and the cause is remanded, with directions to cancel the deed.

E. J. Polk for appellant.

O. S. Poston for appellees.

SPOONER v. BEST'S EX'OR.

(Filed February 4, 1880—Not to be reported.)

1. *Supersedeas*—Execution of bond before wrong officer—The obligors in a supersedeas bond are liable, although the clerk before whom the bond was executed had no authority to accept the bond or issue the supersedeas, if the supersedeas had the effect to stay all proceedings on the judgment.

2. *Alteration of instrument*—Evidence—Where the clerk before whom a bond was executed and his deputy state positively that it bears its true date, detailing circumstances from which they are able to make this statement, such positive statements by those who ought to know will not be outweighed by the statement of experts that the date has been altered or by the fact that copies having been made bearing a different date.

Appeal from McCracken Common Pleas Court.

Opinion of the court by Judge Pryor.

It is evident from an inspection of the original bond on file in this court that it bears date on the 25th of June, and not the 28th of that month. Both the clerk and his deputy swear positively to the fact that the bond was executed at the time it bears date, and detail circumstances transpiring at the time from which they are able to make this statement without regard to the endorsement on the bond. These witnesses stand unimpeached and their testimony uncontradicted. Experts say that the date has been altered, but this is not sufficient to invalidate the statements made by the clerk, aided by the endorsement on the bond. Nor is the fact that copies had been made with the date the 28th, instead of the 25th, to be relied on to overthrow this positive and uncontradicted testimony for the appellant.

Those who ought to know when this bond was executed have sworn that it bears its true date, and if altered, by whom was the alteration made and when? If the figure 8 had been made and the figure 5 afterward made over it, it by no means follows that it was done at a time subsequent to its execution, and certainly this will not be presumed when there is direct and positive testimony as to the time of its execution. The verdict, therefore, should have been for the appellant, or, if not, the chancellor when called on to allow the claim should have disregarded it. Nor is it, in our opinion, material whether the bond was executed on the 25th or the 28th, the parties being liable in any event.

Judgment, the issuing of the execution, the service of the supersedeas, the appeal and its affirmance, and the subsequent insolvency of Brazelton, are all facts admitted by the answer, the only defense being that the clerk had no authority to take the bond or issue the supersedeas. If these parties have voluntarily interfered, and by the execution of this bond and the issuing of a supersedeas stayed the execution and prevented

the collection of the money, there is no reason why they should not be made liable. They were not compelled to execute the bond by an officer who had no authority to make such a demand of them, but they voluntarily, if their view be the correct one, sought one who had no such authority, and required him to take a bond that had the effect to stay all proceedings on the judgment until the case was tried and disposed of in this court, and neither the principal nor surety will be allowed to avoid responsibility by reason of their own illegal act. They accomplished by that proceeding, although illegal, all that could have been attained if the appeal had been obtained in this court.

The case of *Jones v. Green*, 12 Bush, 127, was on a demurrer to the petition in which there was no allegation that a supersedeas had issued, and while some allusion is made in the opinion as to the want of authority on the part of the clerk to accept the bond or issue the supersedeas, it was not intended to decide, nor does it decide, that the surety is not liable for the damages sustained, although the clerk may have had no authority to accept the bond or issue the supersedeas. If by so doing he has injured the party complaining a liability exists.

This view is sustained by the whole current of authority in this State. It is unnecessary, however, to pursue this view of the question presented, as the proof authorized a judgment for the appellant, the bond having been executed on the 25th and not the 28th of the month.

No demand was necessary to be made of the administrator. The action had been instituted in the lifetime of Best. It was consolidated with the action for a settlement of the estate, and an affidavit had been made to the claim as the law required.

The judgment is reversed and cause remanded, with directions to sustain the attachment and allow the claim of appellant and for further proceedings.

Bigger & Reid for appellant.

C. S. Marshall and Sam Houston for appellee.

HONAKER, &c. v. CECIL.

(Filed September 9, 1886.)

1. Homestead—Where husband and wife have united in a mortgage waiving their right of homestead as directed by statute, and the mortgage appears to be duly acknowledged, a judgment of foreclosure in an action in which both husband and wife were before the court and made no defense is a bar to an action by them claiming a homestead in the land upon the ground that the mortgage was not acknowledged by the wife as required by statute.

2. Res judicata—The judgment of a court having jurisdiction of the subject-matter and the parties is conclusive not only as to all matters determined by it, but all incidental matters which might have been properly litigated and decided in the same suit.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Bennett.

The appellants, as husband and wife, filed their petition in the Pike Circuit Court against appellee for the purpose of recovering a homestead in a tract of land, which they allege had been sold under a decree of the Pike Circuit Court, foreclosing a mortgage purporting to have been executed by appellants, as husband and wife, to appellee's assignors.

Appellants allege that appellee, as assignee of said judgment, purchased said land at its sale under said decree of foreclosure, and was put in possession of it by a writ of possession.

Appellants were summoned to answer said petition of foreclosure, but failed to appear and make defense to the action.

It is evident that said mortgage, though not copied in the record, by apt words covered and conveyed appellants' right of homestead, if any they had, in said land. Appellants so treat it. This court, for the purposes of its decision, will do likewise.

Although said mortgage, apparently duly acknowledged by appellants, conveyed their homestead in the said land, yet they made no defense to the suit instituted against them for the purpose of subjecting said land, including their right of homestead, to the satisfaction of the mortgage debt. Nor do they give any reason for not doing so.

They seek now to avoid the legal effect of said mortgage by charging that appellant, Malinda Honaker, "never acknowledged said mortgage, separate and apart from her husband, but in his presence." As said, appellants give no reason for not making this defense to the suit of foreclosure, nor do they charge that said acknowledgment was fraudulently obtained; nor do they seek to review, vacate or modify the judgment of foreclosure. They seem to plaint their right to recover their homestead independently of the fact that the court had already adjudicated that matter against them; in other words, they treat that adjudication as void, and rely upon the cases of *Wing, &c. v. Hayden, &c.*, 10 Bush, 276; *McGrath, &c. v. Berry*, 13 Bush, 891, in support of that view!

Those cases are not analogous to this one. The difference is essential. In the case of *Wing, &c. v. Hayden, &c.*, the husband had mortgaged his land, which embraced his homestead, but his wife did not join in the mortgage; she was no party to it for any purpose. Judgment was obtained foreclosing the mortgage, and the property sold to satisfy the mortgage debt. Afterward the husband and wife brought suit against the purchaser to recover a homestead in the land sold under said judgment. The purchasers plead the judgment in bar of Wing's right, etc. This court held that under the statute exempting to bona fide housekeepers with a family a homestead the exemption could be waived only in the manner pointed out by the statute, and any attempt to waive it in any other way would be void. And the mortgage being before the court, and not showing a waiver of the homestead in the manner pointed out by the statute, any default decree rendered by the court attempting to establish a waiver of the right upon any other ground would be a nullity, and, therefore, not a bar to the assertion of a homestead right by an independent action.

In the case of *McGrath, &c. v. Berry* it appeared that while Mrs. Berry joined in the mortgage as a party of the first part, and signed and acknowledged the mortgage, yet she did not join in the grant, nor in any manner express, in terms, her in-

tention either to relinquish dower or to join with her husband in waiving his right of homestead. This court upon those facts held that there was no waiver of the homestead, and for the same reasons given in the case of *Wing, &c. v. Hayden* decided that McGrath and wife could maintain their suit for a homestead, notwithstanding the fact that the land mortgaged had been sold under a judgment of court.

This court holds, in the foregoing cases, that parties are not bound by the judgment of a court upon a state of case that does not exist, or where the facts show conclusively the non-existence of a right to a judgment.

The difference between the case before the court and the foregoing cases is striking. Here the mortgage itself shows that appellants, as husband and wife, joined in the mortgage conveying to appellee's assignor the land; that it was signed by both of them, and acknowledged by them in the manner pointed out by the statute; that they waived their right of homestead in the land as directed by statute. These things being before the court, it was asked to render judgment foreclosing the mortgage, and subject the mortgage property, including the homestead right, to the mortgagee's debt. The court did so. It adjudged, upon a proper case before it, that appellants had waived their right to a homestead in the manner pointed out by statute, and ordered it sold to satisfy the debt against it.

Now the law is well settled by this court that the judgment of a court having jurisdiction of the subject-matter and the parties is conclusive, not only as to all matters determined by it, but all incidental matters which might have been properly litigated and decided in the same suit. (*Crab v. Lakin*, 9 Bush, 163; *Talbott v. Todd*, 5 Dana, 193.)

In this case the right of appellants to a homestead in the mortgaged land was properly before the court for adjudication. Appellants were summoned to answer and make defense to that as well as other matters, if any they had. They could have properly done so, but failed. It is, therefore, too late now to

present the matter of homestead in an independent suit. It is already "res judicata."

Wherefore, it is adjudged by the court that the judgment of the lower court sustaining the demurrer to appellants' petition and dismissing it be affirmed.

York & Ferguson for appellants.

Thos. R. Brown for appellee.

TOMPKINS, ADM'X, &c. v. SOUTHERN BAPTIST THEOLOGICAL SEMINARY.

(Filed March 23, 1880—Not to be reported.)

Where one in response to a circular soliciting subscriptions for the benefit of a religious institution wrote a letter saying: "I have concluded to subscribe \$1,000," and referred to the circular for the terms upon which he made the subscription, the contract was complete, the circular specifying the installments and the time for the payment of each, and stating that notes would be taken therefor. The failure to complete the formal evidence of the contract by executing the notes does not affect its validity or render it incomplete.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Cofer.

The letter of Mr. Tompkins was in answer to a request to subscribe. In it he says I have concluded to subscribe \$1,000, and refers to the circular for the terms upon which he made the subscription. The circular specified the installments and the time for the payment of each, and also stated that notes would be taken for the several installments, and when he said "you can call upon me at any time for my signature," he no doubt referred to the notes for the installments.

The letter and the circular referred to in it contained all the stipulations necessary to a valid contract.

There is nothing in the language of the letter to indicate that he reserved or intended to reserve any right to withhold the subscription, or that his purpose was to signify a willingness to make the subscription at some future time. "I have concluded to subscribe," when considered in connection with the closing sentence of the letter, clearly indicate that he un-

understood he was then subscribing, and that nothing remained to be done but to execute his notes according to the terms proposed in the circular.

The case is unlike any of those cited in the brief, all of which have been considered.

The case apparently most relied upon (*Allen v. Roberts*, 2 Bibb, 98) was decided on the ground that the letter was intended only to give information that the land was for sale, of the price and payments which would be required, and the time when the writer would be in the county.

No time for payment was indicated in the letter, the land was not described, and the closing sentence shows that the writer looked to further negotiations when he should visit the county. If he had said "I shall be down in your county this fall without fail, and will then make you a deed," or "you may then call upon me for a deed," the case would have been more like the case at bar.

If Mr. Tompkins had meant merely that he was inclined to subscribe, or that he thought he would do so, we can not suppose he would have used the language found in his letter. In that case it would have been unnecessary to indicate the terms upon which he proposed to subscribe, and the statement in the last sentence would not only be out of place, but positively unmeaning.

If he intended that the question of his subscription should remain open, why say "you can call upon me at any time for my signature?" According to the views of counsel he meant to say you can call upon me at any time, and I will decide whether I will give you my signature.

The letter shows that that question was already decided, and as held in *Bell v. Offutt*, 10 Bush, 632, the failure to complete the formal evidence of the contract by reducing it into the form of notes does not affect its validity or render it incomplete.

Judgment affirmed.

Barret & Brown and John Marshall for appellants.

Seymour & Edwards for appellee.

THACKSTON v. WATSON.

(Filed September 11, 1886.)

1. Wills—Construction—Defeasible fee—In construing a will no rule of construction will be allowed to defeat the plain intention of the testator as gathered from the instrument as a whole.

2. A testator, after making certain special devises, devised the residue of his estate to his son, "to be paid over to him and to be delivered up to him by the executor when he should arrive at the age of twenty-one years, if he should live that long," the testator having by a previous clause given to his executor the entire management and control of his estate until that time. In the clause immediately following that quoted the testator provided that in case his son "should die without bodily heirs," all his real estate should be converted into money by his executor and equally divided between certain of his relatives.

Held—That the son, upon arriving at the age of twenty-one years, became vested with an absolute estate, and not an estate subject to be defeated upon his dying without issue, it being the testator's intention that the estate should go to his collateral kindred only in the event his son should die without issue before arriving at the age of twenty-one.

3. When an estate is given or devised with remainder over, but in the event the remainderman should die without a child or children, then to a third person, the general rule of construction is that the words dying without children or issue are restricted to the death of the remainderman before the termination of the particular estate, and where an estate is devised to one in fee, but if he die without issue or without leaving a child or children, then to another, the general rule is that the first devisee takes a defeasible fee, which is subject to be defeated in the event of his death at any period without issue.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Pryor.

William Watson, of the county of Mason, died in the year 1870, leaving a last will and testament, and his widow and H. D. Watson, his only child, surviving him. His will is now before this court for construction. By various clauses of his will, preceding those from which this litigation has arisen, he made several special devises, and gave minute and specific directions to his executor as to the control and management of his estate for the benefit of his widow and son. By the eighth clause of the will the executor was directed to rent out the land of the testator to the best advantage until his son arrived at the age of twenty-one years, and by the 9th clause directed

his executor to pay one-third of the net proceeds to his widow, and appropriate the other two-thirds to the benefit of his son as thereafter directed.

By the 10th clause the testator devised the rest and residue of his estate, real and personal, to his son, Henry Duke Watson, to be paid over to him, and to be delivered up to him by the executor when he should arrive at the age of twenty-one years, if he should live that long, and then proceeded to direct the executor as to the manner of raising and educating him.

The son having arrived at age, the executor delivered up to him the estate, and being vested by the 10th clause just quoted with an absolute fee, conveyed a part of the land devised to him by his father to the appellant, who now insists that his title is imperfect by reason of the 11th and 12th clauses of the will. In the 11th clause of the will the testator provides that in case his son should die without bodily heirs, then all testator's real estate shall be converted into money by the executor, and out of the proceeds make certain bequests to his relatives then living, naming them. In the 12th clause he provides that in case his son should die without bodily heirs the whole estate, after paying the particular bequest, shall be equally divided between certain of his relatives therein named.

The appellant maintains that the 10th clause of the will, when construed with the 11th clause, gives to the son a fee simple estate, subject to be defeated at any time by the happening of the event, viz., the death of the son without bodily heirs. On the other hand, counsel for the appellee insists that the son took the fee subject to be defeated upon the contingency only of his dying without bodily heirs before arriving at the age of twenty-one years. The settled and well-understood construction in reference to such devises seems to be that where an estate is given or devised with remainder over, but in the event the remainderman should die without a child or children then to a third person, the words dying without children or issue are restricted or limited to the death of the remainderman before the termination of the particular estate, and it is

equally as well settled that if an estate is devised to one in fee, but if he die without issue or without leaving a child or children then to another, the first devisee takes a defensible fee, which is subject to be defeated in the event of his death at any period without issue. (Berry v. Richardson, 5 Dana, 424; Pool v. Benning, 9 B. Monroe, —; Jarman on Wills, 2 volume.)

Counsel for appellee argues, as no particular estate or interest preceded the devise to appellee, that under the last rule of construction the appellant will be deprived of all title by the death of the appellee at any time without leaving issue surviving him.

The construction of a will or any of its provisions must be controlled by the intention of the party making it, and when that intention is ascertained from the whole instrument it should be adopted, and no rule of construction will be allowed to defeat the express or plain intention of the testator. General rules of construction will be followed when not inconsistent with the manifest intention of the testator. "But," says Mr. Redfield, "the court will place themselves, as far as practicable, in the position of the testator, and give effect to his leading purpose and intention, as indicated by the words of the will construed, with reference to all attending circumstances." The words contained in a particular clause of a will, when alone considered, may bring the devise within the operation of a general rule, but when considered with reference to the whole will a different construction must often prevail, otherwise the plain intention of the testator would be defeated.

It is at last the intention of the testator the court must look to in construing wills, and when that intention is ascertained the general rules of construction are to be applied. Without, therefore, determining the nature of the devise to the executor, whether he was vested with an interest in the estate or not, he certainly had the control and management of the entire property until the son arrived at the age of twenty-one years, and then, by an express provision of the 10th clause of the will, the whole estate was to be paid over and delivered

up to him by the executor when he arrived at the age of twenty-one years, if he live that long.

The 11th clause of the will, following directly the provision of the 10th clause, under which the executor was to surrender the entire estate to the son, provides that in case his son died without bodily heirs, then I direct and will that all my real estate be sold by my executor and converted into money, and distributed as therein directed; and when construing the two clauses together, as they should be, it is evident the plain meaning of the testator was that in the event the son died before the period at which the property was to be delivered to him, and all control over it surrendered by the executor, then the executor was to sell the realty and make distribution as provided by the subsequent provisions of the will.

The two clauses read together direct in substance the executor "to pay over and surrender to the son all the estate when he arrives at the age of twenty-one, if he live that long; but if he should die before that time, without leaving bodily heirs, the estate is to go to his collateral kindred."

In the case of *Duncan v. Kennedy*, 9 Bush, 580, the testator devised his estate to five persons, naming them, directing his executors to take possession and control of the property devised until January, 1872, when the same was to be divided between the devisees, but further provided that if any one of the five should die, then in that event it was to be divided between the survivors. It was held that in order for the devise over to the survivors to take effect it was necessary for the death of the first taker without issue to take place before January 1, 1872.

The testator, when having his will written, was evidently contemplating the death of his son before the period at which he was to have the complete control of the estate, because he directs the property to be delivered over to him if he is then alive; and providing against the contingency of his dying before that time, proceeds to devise his estate to his collateral kindred in the event his son leaves no children.

His executor is to sell and make the distribution, and no such thought entered the mind of the testator as requiring the executor, after his son had arrived at age and taken the custody of the property, to regain the possession of it if his son thereafter died childless, in order that he might sell and distribute the proceeds to others. The remote devisees were living when the will was made, and they were to take in the event the contingency happened before the son reached the age of twenty-one.

The title of the son became indefeasible when he arrived at that age, and, therefore, the title to the land sold by him to the appellant is not encumbered by any clause that might be asserted under this will by the remote devisees.

Nor is this view of the question in conflict with the ruling of this court in *Parrish, &c. v. Vaughn*, 12 Bush, —. In that case the devise to the grandson was in these words: "But should he (the grandson) die before he arrives at the age of twenty-one years, or without lawful issue of his body, then, and in either of these events, the land shall revert back." It was held that the grandson dying without children the estate went back to the heirs of the original devisor. In order to vest the title in that case in the devisee, the grandson, it became necessary to substitute the conjunctive and for the disjunctive or, and, not only so, to disregard the words "then and in either of these events." This the court refused to do, holding that the testator must have understood the meaning of the language used by him, and having given an expression to his intention by using the language referred to, this court would not assume that such was not his meaning and substitute other words with a view of showing a different intention than the face of the will presented. In our opinion the appellant has no cause to complain of his title, and the judgment is, therefore, affirmed.

E. Whitaker and L. W. Robertson for appellant.

Cochran & Son and H. Wadsworth for appellee.

October, 1886—2

LEOPOLD v. FURBER.

(Filed September 11, 1886.)

1. **Supersedeas—Damages**—Where in an action to enforce a lien judgment is rendered for the recovery of the debt, as well as for the sale of the property, and the entire judgment is superseded, the plaintiff is entitled to damages upon the affirmance of so much of the judgment as is in personam, although the judgment for the sale of the property be reversed.

2. **Vendor's Lien**—When in an action to enforce a vendor's lien some of the purchase money notes are not due, the court should not order a sale of the property until the maturity of all the notes if it appears that the property is not susceptible of advantageous division.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Lewis.

The plaintiff in this case in his petition asked for personal judgment on two of the notes then due, and also for the enforcement of the vendor's lien—sale of the seven tracts of land for the satisfaction of all the notes given for the purchase money, although three of them had not then matured.

In accordance with the prayer of the petition the court, at its January term, 1884, rendered personal judgment for the aggregate amount of three of the notes, the third having then become due, and gave the right to an execution thereon.

It was further adjudged at the same time that the plaintiff was then entitled to an enforcement of his lien on all the tracts of land for the payment of all five of the notes, as well those not due as those due, and the master was authorized and directed to make sale thereof for that purpose. But it was provided that in case the plaintiff caused an execution to issue the judicial sale should not be made by the master until the return of the execution, and not then if the amount for which the personal judgment was rendered should have been satisfied by a sale under the execution, or by voluntary payment thereof.

From that judgment the defendant prosecutes this appeal, and February 29, 1884, executed a supersedeas bond in which, after reciting the judgment as rendered, that he had prayed an appeal therefrom and desired to supersede it, he covenanted as provided by the Civil Code in such cases. And upon the

execution of that bond the clerk of the court rendering the judgment issued a supersedeas, which is still in force, commanding appellee and all others to stay proceedings on the entire judgment, as well that part of it in personam as that part which enforced the lien and directed a sale by the master.

Section 376, Civil Code, provides that "in an action to enforce a mortgage or lien judgment may be rendered for the sale of the property, and for the recovery of the debt against the defendant personally."

An answer was filed by the defendant in this case, which was subsequently for cause stricken from the files, and afterwards an amended answer was tendered, but rejected. But as clearly neither the original nor amended answer stated facts constituting a defense to the action, which counsel for appellant seem to concede, the judgment may be considered as having been rendered by default. And as under the Civil Code appellee was entitled to a judgment against appellant personally for the amount of the three notes then due, there was no error by the lower court in rendering it, and to that extent the judgment must be affirmed. And it, therefore, necessarily follows that if the effect of the supersedeas was to stay execution, which might otherwise have been issued and levied on other property of the defendant, besides the seven tracts of land, appellee is entitled to damages.

By section 751 of the Code it is provided that "the supersedeas may be issued to stay proceedings on a part of the judgment, and in such case the bond shall be varied so as to secure the part superseded."

But appellant in this case did not avail himself of the provision of that section of the Code. On the contrary reference is made in the bond not to a part, but to the entire judgment, and it is therein stated that appellant desires to appeal from it, and the order of supersedeas by its terms suspends all proceedings under it.

But we think the lower court erred in enforcing the vendor's lien and directing a sale by the master of any part of the land while two of the notes given for purchase money were not due.

Subsection 3 of section 694, Civil Code, provides as follows: "The plaintiff in an action to enforce a lien on real property shall state in his petition the liens, if any, which are held thereon by others, and make the holders defendants; and no sale of the property shall be ordered by the court prejudicial to the rights of the holders of any of the liens; and when it appears from the petition or otherwise that several debts are secured by one lien, or by liens of equal rank, and they are all due at the commencement of the action, or become so before judgment, the court shall order the sale for a pro rata satisfaction of them; but if in such case the debts be owned by different persons, and be not all due, the court shall not order a sale of the property until they all mature. If all such liens be held by the same party the court may order a sale of enough of the property to pay the debts then due, unless it appear that it is not susceptible of advantageous division; or that, for some other reason, the sale would cause a sacrifice thereof, or seriously prejudice the interests of the defendants."

It is not only stated in the petition, which is not controverted, but it is assumed in the judgment appealed from that the land directed to be sold is not susceptible of advantageous division. And such being the case, it seems to us clear that no part of it could be legally adjudged to be sold until the last lien note fell due.

The appellant in this case was in default when the judgment was rendered only to the extent of the three notes that had matured, and only so much of his land could be legally subjected to sale as was necessary to pay the amount of them. But as the land could not be advantageously divided, it necessarily resulted that all, or none, of it could be sold. To sell and thus deprive the purchaser of the use and enjoyment of all the land, and of the means relied on by him to pay off the notes not due, would be unjust and oppressive. We think, therefore, the construction heretofore given to the subsection quoted by this court in the case of *Faught v. Henry*, 13 Bush,

471, is not only consonant with reason and justice, but with the obvious meaning of the language used, and it should be adhered to.

In that case, which was similar to this, it was expressly held that "the court should not have ordered a sale of the house and lot, unless it appeared it was susceptible of advantageous division, until all the purchase money was due."

Wherefore, so much of the judgment as is in personam must be affirmed, with damages, but that part of it which ordered a sale of the land is reversed and the cause remanded for further proceedings consistent with this opinion.

Alvin Duvall, Chas. J. Helm and F. J. Sutton for appellants.
J. F. & C. H. Fisk for appellee.

PRICE, ADM'R v. THOMPSON, &c.

(Filed September 14, 1886.)

1. New trials—Commissioners in chancery—Purchase by commissioner at his own sale—Where a party files with a commissioner of court his vouchers, properly proved, entitling him to certain credits in the settlement of accounts referred to the commissioner by the court, he has the right to presume that the commissioner will do his duty and report the claims, and if the commissioner fails to do so, and judgment is rendered against the party filing the claims, without reference to the credits to which he is entitled, the court will grant him a new trial if he had no notice before judgment of the commissioner's neglect of duty.

2. A trustee is incapacitated from purchasing at a sale where the trust estate is interested in having the property bring its highest price, and this rule applies not only to trustees proper, but to all persons invested with fiducial power. Therefore, where a commissioner of a court has become the purchaser at a sale under an execution in his favor as commissioner the sale will be set aside at the suit of the party in interest if the purchaser was still acting as commissioner in the case at the time of his purchase, and for that reason interested in having the property bring the highest price.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Bennett.

The appellant filed his petition in the Barren Circuit Court against the appellees, Buford M. Thompson and T. M. Dickey, the master commissioner of the Barren Circuit Court, and

others. In his petition he alleges that appellee, Thompson, filed his petition in the Barren Circuit Court against him as the administrator of Joseph Price, deceased, for the purpose of having the decedent's estate settled, and the sale of land to pay debts, etc.; that appellee, T. M. Dickey, to whom the case was referred as the master commissioner of the court, reported that appellant was indebted to said estate as administrator in the sum of \$295.56; that said report was confirmed without objection, and appellant was ordered to pay said sum to the commissioner, and in default of which execution was ordered to issue. No payment having been made execution issued in the name of the commissioner, and by his direction against appellant, which was levied on a tract of land containing ninety-nine acres belonging to appellant; that said land was sold at execution sale for the sum of \$250, which was less than two-thirds of its appraised value. The appellee, Dickey, purchased it.

Afterward a second execution was issued and levied on the equity of redemption in said land. He alleged that he had paid off and discharged various just claims and demands against the estate of his decedent, exceeding in amount the sum of \$295.56; that he gave the receipts and vouchers evidencing these payments to his attorney to file with the commissioner; that said receipts and vouchers had been lost, either by his attorney or by the commissioner, after they had been given him; that he was not present when the commissioner's report was made, or when it was confirmed, or when the order was made directing him to pay said sum to the commissioner. Nor did he know that such orders were made, or that his receipts and vouchers were lost, until after execution had issued against him.

He prayed the court to set aside the report of the commissioner, the order and judgment directing him to pay said sum to the commissioner, the sale of his land, and grant him a new trial, etc. The court granted him an injunction until further

orders, but on final trial dissolved the injunction and dismissed his petition. From that judgment he appeals to this court.

The appellee, Dickey, made a joint answer with the other defendants. They do not deny that appellant did not know that the commissioner had reported an indebtedness against him of \$295.56, and that the court had confirmed the report and ordered him to pay the money to commissioner, etc., or that his receipts and vouchers had been lost until after execution had been issued against him. Besides, he swears in his deposition to the same thing. The evidence, therefore, as to that matter is conclusive.

The allegation of the petition is that the receipts and vouchers were placed in the hands of the attorney "to file with the commissioner in making said settlement, and they were either lost by said Boles, the attorney, or by said commissioner after they were given to him."

The answer in reference to that allegation is: "They have no knowledge or information sufficient to form a belief as to whether they were placed in the hands of said Boles to be filed with the commissioner." So the answer does not deny that said receipts and vouchers were filed with the commissioner, or that "they had been lost by the commissioner after they had been given to him." The commissioner certainly knew whether such was the fact or not, and his silence is conclusive against him.

Besides, the attorney, Boles, swears: "I placed them, as I now believe, and after the judgment in the case was rendered then believed, in the hands of T. M. Dickey, master commissioner of the Barren Circuit Court: if I did not so place them I lost them, but they were all put together in a paper and handed to Dickey. And I find a part of them allowed and the others not; and as they were not disallowed or rejected, I took it Mr. Dickey mislaid them."

Appellant swears that he did pay said claims against the estate, which were properly proved, etc. Mr. Boles also swears

that said claims were properly proved, etc. No witness contradicts them, nor did appellees offer any evidence at all.

So it may be regarded as conclusively proven, first, that appellant had paid and discharged said debt; second, that he had placed the receipts and vouchers evidencing the payment in the hands of his attorney to be filed with the commissioner; third, that they were placed in the hands of the commissioner and were lost or mislaid, so that they were not allowed to him in his settlement, and by reason thereof judgment was obtained against appellant on a demand which he had already paid.

We understand the general rules of law governing applications for new trials to be, first, when, for newly-discovered evidence, "the names of the witnesses who have been discovered;" second, that the appellant has been vigilant in preparing his case for trial; third, that the new facts were discovered after the trial and would be important; fourth, that the evidence discovered will tend to prove facts which were not directly in issue on the trial, or were not then known nor investigated by the proof; fifth, that the new evidence is not merely cumulative, etc.

Here the evidence was not newly-discovered, but was known to appellant before the trial, and had been prepared by him to be used on the trial. And judging from the record, had it been used on the trial, the issue would certainly have been decided for the appellant.

So the question now is, was the appellant vigilant in preparing his case for trial? Ordinarily we would say not. Had the trial of the case been before a jury or before the court by depositions it would have been his duty to see that his witnesses were duly subpoenaed to attend court to testify, or that their depositions were duly taken. Nor would it be reckoned proper vigilance to leave these matters in the hands of his attorney to attend to, for the attorney is but his agent, and his want of proper vigilance is also that of the principal.

But a different case is presented here. The commissioner is the officer of the court, "the hand of the court," whose duty it is in such cases to receive all vouchers presented to him and

preserve them, and, if properly proven, to allow and report them to court. This being his official duty, and the presumption being that he will discharge his duty, it can not be said that after a person has filed his vouchers with him, properly proven, that it is his duty to keep a watch over him, as in the case of a private person, to see that he discharges that duty by reporting the claims to be allowed by the court. Had appellant's attorney, with whom he intrusted these vouchers to be delivered to the commissioner, failed to deliver them, then it could be truly said that he was wanting in proper vigilance, for in that case his attorney's negligence would be his negligence. But his attorney having delivered the vouchers to the officer of the court, the hand of the court in such matters, properly proven as vouchers, that was all that was necessary under the circumstances. That officer having lost them, and appellant not being apprised of it until after judgment and execution had been obtained against him, he should have had a new trial and the injunction sustained, and the report of the commissioner charging him with \$295.56 set aside, and the order directing the payment of it to the commissioner set aside.

Appellant also asks that the sale of his land under said execution be set aside. It is contended that this should not be done, for the reason that the reversal of an erroneous, not void, judgment does not and can not set aside the sale of property made thereunder. That is, no doubt, the general rule.

But in this case the return of the officer who made the sale shows that the appellee, T. M. Dickey, the master commissioner to whom the case was referred, was the purchaser of the property at the execution sale.

It is also alleged in the petition that he was the purchaser at that sale. The answer says that the return of the officer in that regard was a mistake; that he was not the purchaser, but he offers no proof as to that matter. And the return of the officer being presumptively correct, the commissioner must be regarded as the purchaser. So the question arises, was his purchase valid?

Had he been free from a fiducial character there can be no doubt that his purchase would have been valid.

But standing in a fiducial relation to decedent's estate, equity devolved upon him the duty to protect the interest of that estate.

In such cases the fiduciary can not avail himself of the influence which his position gives for the purposes of his own gain or benefit to the prejudice or injury of those interests which it is his duty to protect.

It is a rule of equity that no man can acquire an interest where he has a duty to perform inconsistent with that interest.

The rule which prevents a person standing in a fiducial relation from acquiring an interest, which is inconsistent with those fiducial duties, stands mainly upon motives of general public policy.

Nor can a man standing in such relation with respect to property be allowed to purchase the property at a judicial or execution sale unless the entire responsibility of obtaining the highest price has been removed or taken out of his hands. If he continues under the duty of seeing the property bring its highest price, he is incapacitated from purchasing.

These principles apply not only to trustees proper, but to all persons invested with fiducial power, such as executors and administrators, assignees of a bankrupt, commissioners of bankrupts, sheriffs and judicial officers in general. (Kerr on Frauds, pages 150, 160; *Stapp v. Soler*, 3 Bibb., 450.)

While the same general principle governs all persons occupying a fiducial character, yet there are two classes of cases controlled by "different special rules."

The first class includes all those instances in which the fiduciary, and those with whom he stands in that relation, consciously and intentionally deal with each other, each knowingly taking a part in the transaction, from which results a contract or conveyance. Here the contract is not necessarily voidable; it may be valid; but a presumption of its invalidity

arises, and that so strong that nothing short of clear evidence of good faith, of full knowledge, of adequate consideration, and of independent thought, consent and action can overcome it.

The second class is where the fiduciary, acting with reference to his trusts, deals with himself in his private or individual character, as where an agent to sell sells the property to himself; or a sheriff buys the property at his own sale. Such transactions are always voidable at the suit of the party concerned. They are not merely presumptively invalid, as in the first class, where good faith, full knowledge, adequate consideration, independent thought, consent and action may be proved, because the sale or purchase, if made privately, is not known, or, if made publicly by coercive authority, can not be controlled, therefore, the good faith, full knowledge, etc., do not control. For those reasons the presumption of invalidity in the first class is rebuttable, and the presumption of invalidity in the second class is conclusive. (Pomeroy's Equity Jurisprudence, volume 3, sections 956, 957.)

These rules being sound and so well sustained by authority, this court does not hesitate to adopt them for the government of all persons occupying a fiduciary character, whether of a private or public nature.

Officers whose powers are not merely persuasive, but coercive, ex parte and arbitrary, should be held to strict impartiality, fidelity and integrity in the discharge of their trusts. All temptation to make private gain, to take unfair advantage, directly or indirectly, should be removed. The most effective way to do so is to declare all such transactions conclusively invalid.

The master commissioner, Dickey, was still acting as commissioner in the case at the time he purchased the land at execution sale. It was to the interest of the estate that the land should bring its full value. It was his duty to encourage its bringing its full value. Therefore, for him to become a bidder for it at the sale antagonized his private interest with his fiducial duty. This he had no right to do.

For these reasons the injunction should have been sustained, a new trial granted, the report of the commissioner allowing the \$295.56, and the order of the court directing its payment, set aside, and the sale of said land set aside, and appellant allowed credit for any sums proved to have been paid by him for said estate not otherwise allowed.

Wherefore, the judgment of the lower court is reversed and cause remanded for further proceedings consistent with this opinion.

Judge Lewis not sitting.

W. P. D. Bush, Finlay Bush and Boles, Nuckols & Gorin for appellants.

W. L. Porter for appellee.

COMMONWEALTH v. STILL.

(Filed October 18, 1885.)

Indictment—False swearing—The provisions of section 184 of the Code as to the requisites of an indictment for perjury do not apply to an indictment for false swearing, it being sufficient in such an indictment to charge that the accused willfully and knowingly swore, deposed or gave in evidence that which was false in a matter which had been judicially pending, or on a subject in which he could be legally sworn, or on which he was required to be sworn; nevertheless proper allegations of the falsity of the testimony of the defendant are as necessary in an indictment for false swearing as in an indictment for perjury, and it is not sufficient to allege in general terms that the statements of the defendant as a witness were false, but the matter alleged to have been sworn to must be negatived by special averment.

It being charged in an indictment for false swearing that the defendant testified falsely that he did not see a game of cards played at a particular time and place, it was not sufficient to state merely that his statements were false, and known by him to be false, but it should have been averred that the accused did see the game of cards played at the time and place mentioned.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Lewis.

The Commonwealth appeals from the judgment of the lower court sustaining a demurrer to the following indictment:

“The grand jurors of the county of Ballard accuse Thos. H. Still of the crime of false swearing, committed in manner and form as follows: The said Still did, on the 9th day of October, 1883, before the finding of this indictment, in the county aforesaid, on his examination as a witness, after being duly sworn to testify the truth, on the trial of a cause of the Commonwealth of Kentucky, plaintiff, and T. P. Clark, defendant, then pending by indictment concerning the violation of the tavern bond of said Clark, which Clark had authority to administer said oaths, and after which the said Still did, falsely and corruptly, testify that he did not, between the 20th day of June, 1881, and the 22d day of April, 1882, see a game or games of cards played in the tavern house or in the saloon of the said Clark, in which game or games of cards so played money nor property of value was bet, won nor lost, when T. P. Clark was present, or had any knowledge or information of the same so far as he (Still) knew. Nor did he testify before the grand jury of this county when R. W. Shelbourn was foreman of the same, that he (Still) saw a game of poker played in Clark's hotel, at Wickliffe, when T. P. Clark, proprietor of the house, was engaged in the game up stairs in said building, where money or property was bet, won or lost, or when Clark was present. All which statements were false, and known to be by said Still to be false, at the time, and was willfully and corruptly made, and testified to said Ballard Circuit Court, having jurisdiction and authority to examine into said charge against T. P. Clark, etc.”

The Criminal Code requires an indictment in every case to be direct and certain as regards the party charged, the offense charged, the county in which the offense is committed, and the particular circumstances of the offense charged, if they be necessary to constitute a complete offense. (Section 124.) And in section 134 it is provided that “in an indictment for perjury or subornation of perjury it is sufficient to set forth the substance of the controversy or matter, in respect to which the offense was committed, and in what court and before whom the oath alleged to be false was taken, and that the court, or

the person before whom it was taken, had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned, etc.”

In an indictment, however, for false swearing it is sufficient to charge that the accused willfully and knowingly swore, deposed or gave in evidence that which was false in a matter which had been judicially pending, or on a subject in which he could be legally sworn, or on which he was required to be sworn. Nevertheless proper allegations of the falsity of the matter on which the false swearing is assigned are as necessary to be made as are required in an indictment for perjury. In each case the indictment should be direct and certain as to the falsity of the oath taken, which, in both cases, must be knowingly and willfully made.

It is a settled rule in criminal pleading that an indictment for perjury must negative, by special averment, the matter alleged to have been sworn to by the accused. (Archibald's Criminal Practice and Pleading, volume 2, page 965.) And we see no reason why the same rule should not be applied as a test of the sufficiency of an indictment for false swearing, for in each case the issue is whether the accused has, on the matter about which he could be legally sworn, willfully and knowingly sworn falsely.

According to that rule we think the indictment is defective.

It is sufficiently stated that the oath was taken before a court authorized to administer it, and on a subject in which the accused could be sworn, but instead of negating each or any of the statements of the accused as a witness by special averments, a general and sweeping charge is made in the indictment that they were all false, and known to be false by him.

It should have been specially averred, if it could truthfully, that the accused did see the game of cards played at the time and place mentioned; that money or property was then and there bet and won or lost, and that the accused did know Clark had knowledge or information of the game.

As to the attempted charge that the accused testified falsely before the grand jury it is impossible to say, if the indictment

is construed according to rules of grammar, whether the statement that the accused did not testify to the facts mentioned is to be considered as made on oath by him, or as a declaration or assertion in behalf of the Commonwealth. But waiving this objection, there is no averment that he did testify before the grand jury at any time or about any matter.

For the reasons indicated we think the indictment is fatally defective, and the judgment sustaining the demurrer to it is affirmed.

P. W. Hardin for appellant.

MULLIGAN v. COMMONWEALTH.

(Filed September 16, 1886.)

Indictment—Aiders and abettors—In order to convict one as aider and abettor the principal must be indicted jointly with him, or, if he be indicted alone, the indictment must disclose the name of the principal, and give a description of his acts.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted in the Grant Circuit Court of the crime of detaining Margaret Ford against her will, with the intent to have carnal knowledge with her.

The indictment charges appellant alone with the commission of the crime.

The evidence of Mrs. Ford shows that at about 12 o'clock at night appellant, together with two other persons, all of whom she knew, came into her house, while she and her husband were in bed, and knocked out the light, and then one of them went to the bed and struck her husband one blow with an iron spike, as she supposed, which knocked him senseless; and then one of them took her out of bed and stood her up against the foot-board of another bed, and, with one hand upon her throat and the other around her waist, raped her; that they then left the house and returned after awhile, and another one of them raped her in precisely the same manner. She does not pretend

to know which one of the men was guilty of this treatment of her, but the inference is strong that it was not the appellant. She is the only witness who testified in reference to this matter.

The lower court then instructed the jury in substance, first, that they must find the defendant guilty if they believed from the evidence, beyond a reasonable doubt, that he detained Mrs. Ford against her will to have carnal knowledge with her himself, or that another man should have carnal knowledge with her; or, second, that, being in convenient distance for that purpose, he aided and abetted others to detain her against her will to have carnal knowledge with her.

The appellant excepted to this instruction. And the jury having found him guilty and fixed his punishment at confinement in the State penitentiary for the period of two years, and the appellant having moved the court to grant him a new trial upon the ground, among others, that the foregoing instruction was wrong, and the court having overruled his motion, he has appealed to this court.

The appellant complains of the second part of the instruction as erroneous.

The appellant contends that as he was indicted as the sole perpetrator of the crime, he could not be convicted as an aider and abettor. We shall devote our inquiries to that matter.

Blackstone, in the volume 2 of his Commentaries, page 34, says: "A principal in the first degree is he that is the actor or absolute perpetrator of the crime; and in the second degree he is who is present aiding and abetting the fact to be done, which presence need not always be an actual and immediate standing by, within sight or hearing of the fact, but there may be also a constructive presence, as when one commits a robbery or a murder, and another keeps watch or guard at some convenient distance."

It is true that they are both principals. The one who is the absolute perpetrator is principal in the first degree; the other who aids and abets is principal in the second degree.

To make a man principal in the second degree there must be a principal in the first degree to do the principal fact, to perpetrate the main fact; failing in that there can be no principal in the second degree.

The principal in the first degree is the one who actually commits the criminal act. By his act he is guilty, without reference to the act of the principal, in the second degree. It does not require the aid of his act to complete the guilt of the principal of the first degree, but the principal of the second degree can not be guilty of crime unless the principal of the first degree actually perpetrates the act. By perpetrating it he is guilty, although the principal in the second degree fails to do his part; but if the principal in the first degree fails to do his part the principal in the second degree, although he has done his, is not guilty.

So one can not be guilty of aiding and abetting the perpetration of a crime without first showing that the crime has been actually committed by another party.

One can not be aider and abettor of himself in the commission of a crime. Two or more persons must act. So one can not be convicted as aider and abettor of a criminal act without proving that some one else participated by actually perpetrating the crime.

While it is well settled that two or more persons indicted as the actual perpetrators of a crime may be convicted as principals, although some of them were merely aiders and abettors (*Thompson v. Commonwealth*, 1 Met., —; *Young v. Commonwealth*, 8 Bush, —), yet the principle of these cases does not meet the question here. There the principal and the aiders and abettors were all jointly indicted as principals. They were notified by the indictment that the Commonwealth would try to make out a complete offense against all of them by proving the separate acts of each relating to the perpetration of the deed. Those cases do not show that a person indicted as the perpetrator of a crime can be convicted upon proof that some one else not charged or named in the indictment was the perpetrator, and the person charged merely his aider and abettor.

by doing some act possibly out of sight or hearing of the principal fact.

The Criminal Code, section 122, says that the indictment must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended. etc."

The object of the indictment is to make known to the accused with what particular crime he is charged, and that the Commonwealth will attempt to prove it as charged. So to indict both the principal and the aider and abettor as principals they are notified that the Commonwealth can and will attempt to prove, in order to make out their crime, that one did the principal act and the other aided and abetted, and may prepare their defense accordingly.

Or if the Commonwealth does not choose to indict the principal in the first degree, or for any reason can not do so, but wishes to indict the aider, and will set forth in the indictment the name of the principal, together with his acts or participation in the crime, then it can be said that defendant is given a statement of the acts constituting the offense charged against him. On the other hand, to indict him as the only perpetrator of the crime, and then on the trial be permitted to prove that he was not guilty of the crime as charged, the actual perpetrator of it, but that some one else was guilty, not named in the indictment, and thus secure a conviction, would certainly violate the rule. Of course if the party indicted was the perpetrator of the crime, if his act completed it, then the principle contended for does not apply. It is only in the case of aiders and abettors, who do not commit the principal fact, whose acts of themselves are not criminal, and in the nature of things can not be, but some third party must do the material act to complete the crime in order to reach the aider and abettor, that we hold that in order to convict one as aider and

abettor the indictment must include the principal actor jointly, or disclose who he is, together with a description of his acts; then it can be truly said that the indictment furnishes the defendant with a statement of the facts constituting his offense, etc. Being thus notified he is given an opportunity to prove in what relation this third party stood to the principal fact—whether guilty or not guilty, whether justifiable or excusable.

This court, in the case of *Tully v. Commonwealth*, 11 Bush, 158, says: "In all such cases, both at common law and under the statute inflicting punishment on accessories, it devolves on the Commonwealth to show the guilt of the principal felon before a conviction of the accessory can be had; therefore, it is necessary that an indictment shall contain such allegations as to the commission of the crime and guilt of the principal as would make it a good indictment against the principal; and these statements are indispensable to the validity of an indictment, whether joint or several, in a proceeding at law or under the statute."

The foregoing is the rule in regard to accessories. Why? Because they are not the perpetrators of the principal fact, but when another perpetrates it they are both equally guilty; yet it is necessary to inform him in the indictment who that perpetrator is, etc.

Also the aider and abettor is not the perpetrator of the principal fact. He can not be convicted without first showing that the crime has been actually committed by a third party.

The case of *Tully v. Commonwealth* and this case, it seems to us, stand, as far as the question involved here is concerned, upon similar grounds.

We conclude, therefore, first, that the Commonwealth may, if it chuses, indict both principal and aider and abettor jointly as principals, and secure a conviction against both without violating the rule of the Code *supra*, because they are then furnished with a statement of the facts constituting their crime.

Or, second, the aider and abettor may be indicted alone, but in that case he ought to be furnished with a statement of the

acts constituting the crime. This can only be done by setting out in the indictment the acts of the principal actor, etc.

By this course the Commonwealth can not be wronged, and the defendant can not be taken unawares or by surprise because the Commonwealth informs him by a full statement of the facts of which he is charged.

We have examined the authorities with reference to this matter extensively, and find but one expression in any of the works on criminal law that militates against the views here expressed. In Mr. Bishop's Criminal Procedure, volume 2, page 8, he states that the aider and abettor may be indicted and tried without naming the principal in the indictment. He refers to but one case to support that view, to wit: *Rex v. Borthwick*, 1 Douglass, 207. That case does not treat of the question at all, but by inference it is an authority against the view taken by Mr. Bishop.

We think, therefore, the second part of the instruction an error to the prejudice of the substantial rights of appellant, and that his motion for a new trial should have prevailed.

Wherefore, the judgment of the lower court overruling appellant's motion for a new trial is reversed and the case remanded, with directions to grant him a new trial and for further proceedings consistent with this opinion.

H. Clay White for appellant.

P. W. Hardin for appellee.

JOHNSON, &c. v. FERRELL.

(Filed September 14, 1886—Not to be reported.)

1. Pleading—Lien for street improvements—While in order to enforce a lien for street improvements it is necessary to allege and prove every step necessary to create the lien, the allegation that an ordinance was passed is not a mere legal conclusion, but the averment of a fact, and is sufficient.

2. Apportionment of cost of improvement—The apportionment by the city council of the cost of a street improvement in the city of Louisville is a condition precedent to the right of the contractor to enforce his lien for the cost of such improvement and must be alleged; it is not sufficient to aver that

the cost was apportioned by the city engineer. there being no averment that his apportionment was approved by the council.

3. Constitutional law—Power of legislature to alter rules of pleading and evidence—The act of March 24, 1882, providing that all the courts of Jefferson county shall take judicial notice of the passage, approval, contents and publication of each ordinance of the city does not dispense with the allegations in regard to the passage and publication of an ordinance for a street improvement necessary to be made in a petition by the contractor to enforce his lien, the legislature having no power to dispense with allegations essential to make out a cause of complaint, or to make one rule of evidence or pleading for the courts of Jefferson county and a different rule for courts outside of the county.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

While the cases of *Ormsby v. The City of Louisville*, 79 Ky., 197, and *Thomason v. Kendall* establish the rule that every step necessary to create the lien or liability must be both alleged and established by the proof, the case of *Preston v. Roberts*, 12 Bush, 570, holds that the allegation that an ordinance was passed is not a mere legal conclusion, but the averment of a fact, and, therefore, the original opinion in this case is so modified as to conform to that opinion.

Nor should the case of *Ormsby v. The City of Louisville* be construed as in conflict with this rule. In that case the question turned upon the averment of the publication of the ordinance, the law requiring the annual levy ordinance to be published once in at least two newspapers of the largest circulation. This court held that the averment that the publication was made as required by law was a legal conclusion, and the facts with reference to the publication should be set forth showing how, and when the condition precedent was performed. That a general allegation of covenants performed, as authorized by section 149 of the Civil Code of 1851, was not made part of the Code of 1877, and, therefore, the common law rule must apply.

This rule of pleading, however, does not affect the question here. The passage of the ordinance constituting the basis of recovery having been alleged, then all the steps or proceedings under the ordinance necessary to make the property holder

liable must be specially pleaded, and the averment that due publication was made is insufficient, it being necessary to allege that it was published, and in two of the newspapers, naming them, for such a length of time, etc., as required by the city charter.

There is no allegation in the petition that the apportionment between the lot owners was made by the city council when the law requires it. It is averred that the cost was apportioned by the city engineer, and nowhere averred that it was affirmed by the council.

The law requires, in express terms, that the cost "is to be equally apportioned by the general council," and this must be held to be a condition precedent to the plaintiff's right of recovery.

The appellee attempts to escape the necessity for making such averments by reason of the act of 24th of March, 1882, providing that all the courts of Jefferson county shall take judicial notice of the passage, approval, contents and publication of each ordinance of the city, and, therefore, no such facts were necessary to be stated in the pleading. In the case of the City of Louisville v. Cochran, decided in the spring of 1884, this court held that while remedies in courts of justice, afforded the citizen for the protection of person and property, are subject to be changed by the legislature of the State, the power to dispense with the allegation of essential facts necessary to make out the cause of complaint, or to prevent substantial defenses, does not exist with the legislature, and its attempted exercise in that case was denied. While the passage of the ordinance, its approval, and the acceptance of the work under it may be made prima facie evidence of the validity of the ordinance, and place the burden on the defendant, still the facts necessary to constitute a cause of action, to support which such evidence may be given, must be alleged, and the failure to do so in this case renders the petition defective, and the general demurrer should have been sustained.

But it is argued that the courts of Jefferson county must, under the act of 1882, take judicial notice of the passage, approval, contents and publication of each ordinance of the city. If such legislation is proper the objection then arises as to want of uniformity in the act making that evidence in the courts of Louisville that is incompetent elsewhere, and in having one rule of pleading for the courts of the city and a different rule for the courts outside of the city. If judicial notice is to be taken of the passage and approval of city ordinances by the one court it should be by the other. The validity of an ordinance may be brought in question in any other court of the State as well as in the courts of Jefferson county. Liens for improvements may not be enforced in any other court, but as between the vendor and the vendee of realty in the city, where such encumbrances have been removed by the purchaser, his right to do so may be denied, and the validity of the ordinance assailed. If so, a different rule of pleading would prevail.

Pleadings should be uniform, and facts necessary to constitute a cause of action in the one court where pleadings are required should be essential in the other.

This legislation of March, 1882, while some of the sections of the act are unobjectionable, is an effort on the part of the legislature to make the sufficiency of a petition depend upon the legislative judgment as therein expressed, instead of the judicial, and to require the courts of Jefferson county to pronounce that good which is bad.

Such legislation should not be followed by the courts. The legislature may change the rules of evidence, and may withdraw or abolish a particular remedy; it never ties its hands, says Mr. Justice Cooley, as to the modes by which it will administer justice, but, at the same time, must afford adequate process for the enforcement of rights.

The defendant, before he can be called to answer, should know the character of the complaint against him, and such facts should be alleged and proved, when denied, as will au-

thorize the recovery, of the sufficiency of which the courts should be the judge and not the legislature. Some question has been raised in regard to the apportionment, the appellant insisting that the property over which the apportionment was made, some portion of it at least, has no connection with the other; that the lots or squares are not contiguous.

We have not examined this question, and leave it an open one to be litigated in the court below, as the case must go back for further preparation. The plaintiff may traverse the pleadings. Judgment reversed and remanded for proceedings consistent with this opinion.

John Stites for appellants.

Lane & Burnett for appellee.

***BERRY v. SHEEHAN.**

(Filed September 15, 1886.)

Vested rights—Power of governor over officer's part of fine—Not only has the governor no power after judgment to release so much of a fine or penalty as the law has set apart as fees to the officers of the court, but he can not take away the right to collect that part of the fine by imprisonment. The imprisonment for which the statute provides is in no sense for the punishment of the crime, but is a means of collection.

Appeal from Franklin Common Pleas Court.

Opinion of the court by Judge Ward.

Appellant Berry was convicted of the offense of suffering gaming on his premises, and adjudged to pay a fine of \$200. Failing to pay or replevy the fine he was sent to jail on the 3d day of February, 1885. On the 5th of March, 1885, the governor granted to said Berry a respite for six months against the collection and enforcement of said judgment except commissions, fees and costs. Berry caused the respite to be presented to the jailer, and demanded that he be released from custody. The jailer refused to release him, and he then insti-

*This is a Superior Court opinion, and is published here by mistake.

tuted this suit for false imprisonment. His petition was dismissed on demurrer, and he appeals.

“He (the governor) shall have power to remit fines and forfeitures, grant reprieves and pardons, except in cases of impeachment; * * * but he shall have no power to remit the fees of the clerk, sheriff or Commonwealth’s attorney in penal or criminal cases.” (Section 10, article 3 of the Constitution.)

It is now provided by law that the Commonwealth’s attorney shall receive 30 per cent. of all judgments rendered in favor of the Commonwealth in his district; the county attorney 15 per cent. of all judgments in his county, and the circuit clerk 10 per cent. of all judgments in the court of which he is clerk, but it is not lawful for any of these officers to receive any portion of the fine or forfeiture to which they are respectively entitled until the collecting officer has collected the same, unless that portion not belonging to them shall be remitted. If only a part is collected, then the amount collected is divided pro rata.” (Section 5, article 4, chapter 5, General Statutes; Sessions Acts 1883-’4, pages 190 and 191.)

“Upon judgments for fines, whether rendered on indictments, penal actions or otherwise, writs of execution, as provided in the General Statutes, may be issued against the person or property of the defendant.” (Section 301, Criminal Code.)

“The defendant shall not be held in ~~confinement~~ under an execution for a fine for a longer period than at the rate of one day for each \$2 of the fine, but such confinement shall not discharge the fine, which thereafter can only be collected by proceedings against the defendant’s property.

“The provisions of this section shall not apply to judgments in city or police courts, which may be discharged by confinement in the city workhouse, according to the provisions of special statutes regulating them.” (Section 304 of the Code.)

The construction given to the constitutional provision is that the officers have no vested interest in the fine until it is fixed by a judgment of court. Until then the governor has the right to pardon the offense or release from the penalty, but

after conviction and judgment the governor has no power to release so much of the fine or penalty as the law has set apart as fees to the officers.

This much is admitted by counsel for appellant, but it is claimed that the rights of the officers are confined to receiving their respective portions of the fines after they are collected, and that the governor may interpose and prevent the officers of the law from exercising one of the modes provided by law for the collection of the fine.

This idea is based, as we think, upon a misconception of sections 301 and 304 of the Code. The imprisonment provided for is in no sense for the punishment of the crime or offense, but as a means for its collection, and continues until the fine is discharged or the time of confinement ceases. The right to take the person of the defendant in execution and detain him one day for each \$2 of the fine applies to all judgments and every part of the judgment for the fine that is not satisfied or discharged. If that part of the judgment over which the governor has power is stayed or satisfied by respite or pardon, then for that time or to that extent there can be no collection, and consequently no imprisonment. But this partial stay or satisfaction no way interferes with the operation of the laws as to that part of the judgment over which the governor has no control.

We do not find one set of laws providing how fines shall be collected when the executive does not interfere, and another set providing how they shall be collected when he does.

But waiving the question as to whether the governor could or could not relieve a party from imprisonment for the time provided by law, which is equal to that part of the fine which enures to the benefit of the officers named, it is sufficient to say that he has not attempted to do so in this case. There was no respite so far as fees and commissions were involved; they were excepted and no time given as to them, hence it was the duty of appellant to pay them, and for failure the jailer

had the right to keep him in custody until the time expired as to that part of the fine.

The judgment is affirmed.

W. H. Julian, Ira Julian and R. A. Thomson for appellant.

A. Duvall for appellee.

BARNEY & SMITH MFG. CO. v. HART, RECEVIER.

(Filed September 16, 1886—Not to be reported.)

1. Sales of personal property—Passing of title—The title to personal property passes upon delivery, notwithstanding the contract of sale provides that no right or title to the property shall pass to, or vest in, the purchaser until all the purchase money is paid, and that upon the failure of the purchaser to pay the deferred installments of the purchase money the seller shall have the right to resume possession of the property and sell it for the payment of the debt. Nor does such a contract, unless recorded, create a lien as against purchasers and creditors.

2. Lien—Conflict of laws—When personal property is sold in another State and brought to Kentucky, whether or not the seller has a lien for the unpaid purchase price as against creditors and purchasers is to be determined by the law of this State, and not by the law of the State where the property was sold.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the month of March, in the year 1877, appellant, the Barney & Smith Manufacturing Co., doing business in the State of Ohio, entered into a contract with one A. P. Berthoud to construct for him the two cars in controversy at the price of \$2,400, payable in installments. The sum of \$1,400 was paid when the contract was made and Berthoud's note executed for the balance, which seems, or the greater part of it, never to have been paid. By the terms of the contract it was agreed that on the failure of the purchaser (Berthoud) to pay the deferred installments the company (now appellant) should have the right to resume possession of the property, and sell it for the payment of the debt, and in the event it failed to pay Berthoud was still liable to the appellant therefor.

It was also stipulated that no right or title to the cars should pass from or vest in Berthoud until all the purchase money was paid, and on full payment, and not before, the title to the cars, and the absolute property and possession thereof shall vest in Berthoud, the party of the second part.

The cars were constructed for the purpose of being used on the Covington, Flemingsburg & Pound Gap Railroad, in the State of Kentucky, and, when finished by the company, were delivered to Berthoud, and by him brought to Kentucky, and placed upon and used on that railroad. A man by the name of Quintard had contracted with this Pound Gap Railroad Co. to construct and equip several miles of the road, and in the settlement of the accounts of Quintard the value of these cars were charged to him as a part of the equipment of said road, and credited to Berthoud.

A short time after the cars had been placed on the road many of the laborers and contractors who had worked on this road in its construction, and who had not been paid by Quintard for their services, instituted actions against him and the railroad company in the Fleming Circuit Court, and obtained general attachments, that were levied on the property of the company and Quintard, including the cars in controversy, the road being then operated by Berthoud, who was, as the proof clearly indicates, the mere agent of Quintard, the original contractor.

The actions against Quintard were consolidated, and proceeded to trial under the name of Mason, Shannahan & Co. v. The Covington, Flemingsburg & Pound Gap Railroad Co., and Quintard.

A receiver was appointed, who afterwards resigned, and another substituted, and by an agreement with each Berthoud was permitted to operate the road with the cars upon it as if no suit had been instituted, Berthoud agreeing that on the 1st of March, 1879, he would deliver up to the receiver the rolling stock, loose materials, personalty, and all the property now on

the track of said railroad, and belonging to the same without any further notice.

Berthoud was in fact operating the road under the direction of the receiver from the time the court placed the road in his possession.

After the institution of the various actions in the Fleming Circuit Court the appellant (Manufacturing Company) instituted an action in the United States Circuit Court for the district of Kentucky against Berthoud to recover from him the possession of the cars under its contract.

The ~~marshal~~, by a process from that court, seized the two cars, and before removing them they were taken from him by the receiver. Appellant's action against Berthoud in the district court was still prosecuted, and, Berthoud failing to appear, a judgment by default was entered, and the marshal again seized the cars, and when this was done the receiver, in the Fleming Circuit Court, instituted his action as such against the marshal, and regained the possession. When the action in the Fleming Circuit Court by the receiver against the marshal was called the appellant (Manufacturing Company), by its petition, asked to be made a defendant in lieu of the marshal, which was done, and then by motion had the case transferred to the United States Circuit Court at Covington for trial.

The receiver, by an order of the Fleming Circuit Court, was directed to prosecute the action, and when the case was transferred to the district court each party submitted to the jurisdiction of that court, and the law and facts having been submitted to the judge a judgment was rendered adjudging that the receiver was entitled to the cars, and gave costs against the appellant.

In that action transferred from the Fleming Circuit Court to the United States District Court the appellant filed an answer setting up title by reason of its judgment by default in that court against Berthoud, and by an amended answer set up title in its own right as against Berthoud and all others, claiming to be the original and absolute owners of the prop-

erty. On the entire pleadings an issue was raised and the title of the appellant brought directly in question, and the judgment rendered as heretofore stated.

After that judgment the appellant, conceiving that its only effect was to restore the possession of the cars to the receiver of the Fleming Circuit Court on the ground that he had been unlawfully deprived of it by the marshal, filed its petition in the consolidated attachment suits pending in the Fleming Circuit Court, and asked to have the cars sold, and the proceeds of sale applied to the payment of its unsatisfied debt.

To this assertion of right the appellant is met, first, with the judgment rendered in the district court in bar of any further claim of title; and, second, with the objection that under the contract between the appellant and Berthoud the title as to creditors and purchaser passed from the appellant because the contract, being in the nature of a mortgage, had never been recorded.

Whether the judicial determination of the United States Circuit Court was in favor of the receiver on the question of title, or merely restored to him the possession of the property, the State Court having first obtained jurisdiction, we shall not stop to inquire, as, in our opinion, the title to the property passed to the purchaser, Berthoud, the lien retained by the contract on the part of the manufacturing company being in the nature of a chattel mortgage.

The statute of this State provides that "no deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid against a purchaser for a valuable consideration, without notice thereof, or against creditors until such deed shall be acknowledged or proved according to law, and lodged for record." (Section 10 of chapter 24, General Statutes.

In this case \$1,400 of the purchase money was paid to the appellant by Berthoud, his note executed for the remainder, and the cars delivered to and brought from the State of Ohio to the State of Kentucky by him, and placed upon the road of

the company, under the contract with Quintard to construct and equip certain parts of the road at a fixed price. That it was a sale of the cars to Berthoud is manifest, and the reservation of title in the vendor was simply to create a lien by the appellant as against any purchaser or creditor of the vendee. It was a lien for the purchase price, or a part of the purchase money, that would be enforced between the parties, but did not affect the rights of creditors unless recorded or lodged for record as provided by the statute.

All the appellants could have done under the contract was to regain the possession and sell the property to satisfy the unsatisfied claim. The vendee had agreed that the vendor should sell instead of the chancellor, and but for this provision of the contract a court of equity would have been called on to enforce the lien.

Appellant had made its vendee the ostensible owner; had received more than half the purchase money, and when the cars have been transferred to an adjoining State and placed upon the track of the railroad company the appellant, with this evidence of the lien in its pocket only, is now insisting that no title ever passed to its vendee, or that it has a prior equity against the claims of creditors. To so hold would be to disregard the plain provisions of the statute enacted to prevent fraud and protect the rights of creditors and purchasers, and, as said by this court in the case of *Greer v. Church & Co.*, 13 Bush, 430, the title in such cases will be treated as being where the nature of the transaction requires it should be. The cases of *Vaughn v. Hopson*, 10 Bush, 337, and *Greer v. Church & Co.*, 13 Bush, 430, settle this question.

In the case of *Heryford v. Davis*, 102 U. S., 235, on error to the circuit court of the United States for the Western District of Missouri, the manufacturer of cars agreed to loan to B, for hire, certain cars to be used on its road, and at the same time took notes from B for the value of the cars, with certain bonds of the company as collateral security for the payment of the notes, the latter to have the privilege, at any time during the four months (the period of hiring), to purchase the

cars on the payment of the notes, and that until such payment is made in full B shall have no right, title, claim or interest in the cars except as to their use for hire.

In default of payment A was to sell the cars for so much as might be needed to pay the amount due on the notes, and the balance, if any, to be paid over to B, and when all the notes are paid A agreed to give B a good and sufficient bill of sale.

The cars were delivered to B without the contract having been recorded, and C, obtaining a judgment against B, levied on the cars. The Supreme Court held that the title to the cars passed to B, and that to protect them from seizure and sale by C the contract should have been recorded as provided by the laws of Missouri. A similar decision was also rendered by the Supreme Court in the case of *Hervey v. R. I. Locomotive Works*, on error to the circuit court for the Southern District of Missouri, 93 U. S., 664.

It is insisted that Berthoud was not indebted to any of the creditors of Quintard or the railroad company, and, the title being in him, his property should not be subjected to pay another's debt.

This question is not raised by Berthoud, and during the entire litigation he has made no claim to these cars, or interposed by any pleading in the Fleming Circuit Court to show title in himself, or that he had any interest in the litigation. His testimony might have shed much light on the subject, and although anxious to prevent creditors from making their debts by the sale of the cars, he fails to testify as to title in himself or to speak at all with reference to the claims of others. The suits had been pending in the State court since March, 1877, by these creditors, claiming that the cars belonged to Quintard or the railway company. He made no claim in his own right, but undertook to operate the road as the agent of the receiver. In February, 1878, long before the appellant sued Berthoud in the United States Circuit Court, as the agent of Quintard or for himself, he made out an account against the railroad company for these cars that was allowed. All the rolling stock

was charged to the company or transferred to it, and not until February, 1879, was the claim of the appellant asserted against Berthoud.

Quintard had agreed to construct and equip this road; the cars and rolling stock were upon it, being used for purposes of transportation; no claim was set up all this while by Berthoud. That he was the agent of Quintard or connected with him in the contract is evident, and equally as manifest that they charged the railway company with these cars long before any claim was set up by the appellant. So whether the cars belonged to the railway company or to Quintard is immaterial. If to the railroad, it was an innocent purchaser; if to Quintard, his creditors can subject them.

As to whether or not the cars were liable to the claims of attaching creditors as against the lien of the appellant must be determined by the law of this State. While the lien may be valid by the laws of Ohio against creditors and purchasers, it has no such effect in this State. (*Green v. Van Buskirk*, 5 Wallace, 310.)

Judgment affirmed.

Lincoln & Stephens and O'Hara & Bryan for appellants.

Wm. J. Hendrick for appellee.

NOEL'S EX'OR, &c. v. GILL, &c.

(Filed September 21, 1886.)

Statute of frauds—Reformation of deed for mistake—The statute of frauds does not prevent a court of equity from reforming the written evidence of a contract within the statute by enlarging or restricting the terms, or the subject-matter of the contract, so as to make it express the contract really made, whenever it is clearly shown that either the terms or the subject-matter of the contract, as it was intended and understood by the parties to it, is not embraced in the writing.

In this case the contract was for the sale of all the lots owned by the vendor over which the roadbed of the vendee, a railroad company, was constructed in whole or in part. The deed to the company by mistake designated the lots conveyed as Nos. 8 and 9, whereas the roadbed was constructed on lots 6, 7 and 8. Held—That the deed should be reformed as to include lots 6, 7 and 8 and release lot No. 9, if the rights of innocent purchasers have not

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intervened. A railroad company which has bought only the title of the original vendee, and is asking that the deed be reformed, is not to be regarded as an innocent purchaser of lot No. 9.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Bennett.

Appellant brought suit in ejectment in the Hopkins Circuit Court against Gill & Randall to recover the possession of a lot of ground, No. 6, situated on the north side of Main-cross street in the town of Madisonville, which lot contained twenty-five feet front and ran 145 feet back.

Randall answered, disclosing the fact that Gill was his tenant and that he held said lot by the authority of the Louisville & Nashville R. R. Co. which was the owner of said property, and asked that said company be allowed to defend. The company appeared and answered.

The answers of Randall and the company disclosed that the Evansville, Henderson & Nashville R. R. Co. bought all of the real property owned by appellant from him situated on said street on which to construct its roadbed; that said purchase included for said purpose lots Nos. 6, 7, 8 and 9. And if the deed, which was made sometime after said purchase, and which the company exhibited with its answer, failed to cover all of said property, then the omission was the result of a mistake. It asked in that case that the deed be reformed so as to cover it.

Appellant in his reply denied that by the terms of said contract of sale lots Nos. 6 and 7 were included or intended to be included; that by the terms of sale only lots 8 and 9 were sold to the Evansville, Henderson & Nashville R. R. Co.

The deed exhibited by the Louisville & Nashville R. R. Co., from appellant to the Evansville, Henderson & Nashville R. R. Co., describes the lots sold to it as lots Nos. 8 and 9, situated on the north side of Main-cross street, in the town of Madisonville, and containing fifty feet front and running back 145 feet, and the same property over which the company had

constructed its railroad; also as the same property that had been conveyed by Wilkins, Commissioner, to appellant.

The deed was made in 1870.

The proof in the case satisfactorily shows that in 1869 the Evansville, Henderson & Nashville R. R. Co. proposed to buy from appellant simply a right of way, for the location of its roadbed over the lots of appellant, situated on the north side of Main-cross street in the town of Madisonville, that appellant, believing that the location of the roadbed on parts of his lots would destroy the value of the remaining parts, declined to sell simply the right of way; but proposed to sell all of the lots that he owned on said street on which the roadbed would be located. This proposition was accepted by the company. The sale thus made was verbal.

It also appears that at the time of this verbal sale appellant did not remember that he owned lots 6 and 7. Having sold said lots to Israel Davis several years before by title bond, and Davis having failed to pay for them, the contract of sale was rescinded and the property reverted back to appellant, which fact he had forgotten at the time he sold said lot to said company; he, therefore, supposed that he owned only lots Nos. 8 and 9.

It also appears that at the time of said sale appellant did not know the precise location or identity of any of said lots, nor did said company.

After said sale appellant and said company differing about the price that ought to be paid for said property, appellant contending that as there was a tobacco factory belonging to him situated on the property sold which would have to be destroyed, the price ought to be more, left the matter to arbitrators to settle. The arbitrators fixed the price, including the factory, at \$1,000, which was paid, and appellant then made the deed above referred to the company.

Appellee is positive in his testimony that said factory was situated on lots Nos. 8 and 9, and not on lots Nos. 6 and 7.

Another witness who testified for appellant gave it as his opinion that said factory was situated on lot No. 10.

Appellees are equally positive that said factory was situated on lots Nos. 6 and 7, and not on Nos. 8 and 9.

It may be regarded as a fixed fact that appellant thought he was selling and intended to sell the lots on which the factory was located; so if it is a fact that the factory was located on lots Nos. 6 and 7, then the question is at once settled that said lots were included in the terms of sale.

On the part of appellees it was proven by the county surveyor that he surveyed all of said lots carefully and accurately, and that said factory was situated on lots Nos. 6 and 7; also that he did business in said factory just before it was torn down by the Evansville, Henderson & Nashville R. R. Co., and knows that the factory was situated on lots Nos. 6 and 7.

Another witness swears that Israel Davis, the person that once owned said lots by purchase from appellant, built said factory on lots Nos. 6 and 7; and that he helped to build it.

Other witnesses, who were well acquainted with the factory and its location from the time it was built until torn down, swear that it was located on lots Nos. 6 and 7. Also one of the contractors to construct that portion of the railroad bed over said lots, swears that said factory, being in the line of the roadbed, was torn down by the orders of the company. He also fixes its location on lots Nos. 6 and 7.

So we have no hesitation in saying that the weight of the evidence clearly establishes the fact that the factory was situated on lots Nos. 6 and 7, and not lots Nos. 8 and 9, or any part of them.

It is also clear that said railroad bed is on parts of lots Nos. 6, 7 and 8, but is not on any part of lot No. 9.

The proof is also clear that appellant intended to, and did, sell to said company all of the lots on which its roadbed was constructed, in whole or in part, but no more.

It is also clear that the deed made by appellant to said company does not embrace, by mistake in the draftsman, all of

the lots sold. This mistake evidently grew out of the fact that neither party knew the entirety or quantity of the property sold.

The lower court, upon these facts, attempted to reform the deed so as to make it conform to the terms of the contract made between the parties by decreeing that appellee, the Louisville & Nashville R. R. Co., was entitled to the four lots, Nos. 6, 7, 8 and 9. Appellant has appealed from that judgment.

The first question presented is, had the court the power to reform the deed and make it conform to the terms of the contract? That question being decided affirmatively, the second question is, did the lower court reform the deed on equitable principles to both parties?

All mistakes occurring in agreements, executed or executory, relate either, first, to the terms of the contract, or, second, to the subject-matter of the contract. The terms of the contract may be stated according to the intention of the parties, but there is an error of one or both in reference to the property to which the terms apply, such as a mistake in reference to its identity, situation, boundaries, title, quantity or value, etc.

Here the terms of the contract were the sale of all the lots owned by appellant on the north side of Main-cross street to appellees' vendor, over which the roadbed was constructed in whole or in part.

The mistake occurred in reference to the identity, location and number of lots included in the terms of sale.

The appellant's attorney suggests that although the mistake may exist as to the subject-matter of the contract, but as the statute of frauds requires the contract to be in writing, parol evidence can not be heard to correct the mistake, because that would be virtually making a contract by parol evidence that the statute of frauds required to be in writing.

The courts of a few of the States have held that contracts required by the statute of frauds to be in writing could only be corrected in the single instance of a mistake in reference to

the subject-matter of the contract, where the error consisted in including more, for instance land, in the written contract than the parties intended, in which case parol evidence might be used to show that the surplus should be omitted or eliminated from the contract as written, and confine the operation of the contract to the remaining subject-matter mentioned in it, and to which the parties intended the contract to apply. The reason assigned for thus limiting the reformation of a contract required by the statute of frauds to be in writing is that parol evidence in that case does not conflict with the statute of frauds, since the relief does not make a parol contract required by the statute of frauds to be in writing, but simply narrows a written one already made.

The courts of the States that have put the most stress on this doctrine had no general equity jurisdiction, but only such limited equity jurisdiction as the statutes of the State conferred upon them. This view of the question, therefore, grew out of that fact. A few other States, however, with general equity jurisdiction followed in the same line of thought.

On the other hand, a large majority of the courts of the States have held that contracts required by the statute of frauds to be in writing may be reformed by courts of equity, so as to enlarge or restrict the terms or the subject-matter of the contract whenever it is clearly shown that the written contract, by fraud or mistake, does not embrace either the terms or the subject-matter of the contract as it was intended and understood by the parties to it.

The courts of equity go upon the ground that the statute of frauds is no real obstacle in the way of administering equitable relief so as to promote justice and prevent wrong. They do not overrule the statute, but, to prevent fraud or mistake, confer remedial rights which are not within the statutory prohibition. In respect to such needful remedies the statute as to them "is uplifted." It has also been said that in case of a written conveyance of land which does not convey as much land as was agreed, or different or more land than was intended by the parties, the court will fasten a personal obligation upon

the party benefited by the mistake to correct it upon the ground that he was holding the property as trustee.

Whether the parol evidence offered to correct the writing on account of fraud or mistake shows the verbal contract to be broader than the written instrument, covering more or a different subject-matter, or enlarging the terms, or is narrower than the written instrument, either in the terms or subject-matter of the contract, courts of equity will grant relief by reforming the contract so as to prevent fraud or mistake. The statute of frauds, in granting such relief, is not violated, but "is uplifted," that it may not perpetrate the fraud that the legislature designed it to prevent. (Pomeroy's Equity Jurisprudence, section 867, and the other authorities there cited.) Also the majority of this court in the case of *Worley v. Tuggle*, etc., 4 Bush, 168, held the same doctrine. The same view has also been held since then by all the members of this court. We adopt them now as correct. We think the court did right in reforming the deed to make it conform to the contract of the parties, but think it erred in adjudging that appellee, the Louisville & Nashville R. R. Co., was entitled to all four of said lots.

As we have said, it is clear that appellant intended to sell, and did sell, all of the lots he owned on the north side of Main-cross street to the Evansville, Henderson & Nashville R. R. Co., on which the roadbed of the company was constructed in whole or in part, but no more. It is also clear that lot No. 9 was not needed or used by said company for said purpose. The roadbed does not touch it, but is constructed on lots Nos. 6, 7 and 8. Therefore, the lower court, upon equitable principles, should have reformed the deed so as to cover lots Nos. 6, 7 and 8, and have quieted appellee's title to them. And also, unless the rights of innocent third parties have intervened, have reformed the deed as to lot No. 9, so as to release said lot from said deed, and restore the title to appellant.

As the appellee, the Louisville & Nashville R. R. Company, bought only the title of the Evansville, Henderson & Nashville R. R. Co., as above set forth, and is itself seeking to reform said deed to conform to the terms of sale, it can not be regarded as an innocent purchaser of lot No. 9, and is not, therefore, included in the suggestion just made, as to the rights of innocent third parties intervening.

For the foregoing reasons the judgment of the lower court is affirmed in so far as it reformed the deed and quieted the title to lots 6, 7 and 8 to appellee, the Louisville & Nashville R. R. Co., and is reversed as to lot No. 9, with directions to restore the title to said lot to appellant, etc., and for other proceedings consistent with this opinion.

A. Duvall for appellants.

W. Lindsay and W. L. Gordon for appellees.

BROOKIE, &c. v. PORTWOOD.

(Filed September 23, 1886.)

1. Wills—Fraudulent suppression—To destroy or suppress a written instrument for the purpose of defeating the rights of others, however innocent the motive, is at least a constructive fraud upon the rights of such persons, and if the destruction or suppression is with a wrong motive, then the fraud is actual; and when the instrument has been intentionally destroyed or suppressed everything will be presumed against the party by whom it has been done.

2. Judgments obtained by fraud set aside—An order of the county court rejecting a will, and an agreed judgment of the circuit court dismissing an appeal from that order declaring the will null and void having been obtained by the fraud of the direct devisees and the executors for the purpose of defeating the rights of contingent devisees, the chancellor acted properly in setting aside those fraudulent orders and judgments and granting a new trial at the suit of one of the executors.

3. Executors—Estoppel—An executor who has violated his trust, and by fraud secured the rejection of his testator's will, will not be estopped from having the fraudulent orders and judgments set aside, but a court of equity will rather encourage him to undo the wrong he has done the estate he was under a solemn obligation to protect.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Bennett.

A. Miller, of Anderson county, Ky., died leaving a last will, which was signed by him and duly attested by the subscribing witnesses.

After devising to his wife, Lucinda Miller, the sum of \$500, which, by antenuptial contract, she was to receive at his death in lieu of any interest as widow in his estate, he directed that all of his real and personal property be sold by his executors after his death, and the proceeds, after the payment of his debts and funeral expenses and the legacy of \$500 to said Lucinda Miller, to be divided in eight equal parts, he having that number of children.

He then devised to each of his four sons one-eighth part absolutely, and one-eighth part to his daughter, Louisa Portwood, wife of Ambrose D. Portwood, to be held by her to her own exclusive use and benefit, free from the control or debts of her said husband. Of the three remaining eighths he directed his executors to hold one-eighth each for the benefit of his three daughters, Mary Ann Wills, Susan E. Brookie and Emily Searcy, but none of said sum or its profits or increase was to be paid to any one of his said daughters as long as her husband should live; and if he should die first, then said estate should be hers absolutely, or if she should die first, leaving children, then her said estate should go to them absolutely; if leaving none, then said estate should go back to his estate to be divided equally among his remaining children. The testator then appointed C. Miller, his son, and Ambrose D. Portwood, his son-in-law, executors of his will.

The said executors offered, or rather pretended to offer, said will for probate to the Anderson County Court, which will was rejected by the order of that court.

Mrs. Lucinda Miller then appealed to the Anderson Circuit Court from the order of the county court rejecting said will.

Afterwards she dismissed her appeal absolutely.

The said executors then appealed to the Anderson Circuit Court from the order of the county court rejecting said will.

Afterwards said appeal, by an agreed judgment, was dismissed absolutely, and the order of the county court rejecting said will sustained, and the will declared to be null and void.

Afterwards Ambrose D. Portwood, one of the executors of the will, and his children instituted an equitable action in the Anderson Circuit Court against said Brookie, Wills and all of the devisees, both direct and contingent, under the will, not joined as plaintiffs in the action, for the purpose of setting aside the agreed judgment of the Anderson Circuit Court sustaining the order of the county court rejecting said will and declaring it null and void, and also the judgment dismissing the appeal of Mrs. Miller absolutely, and for the further purpose of reinstating those causes upon the docket, and having a new trial granted upon the ground that the rejection of said will by the county court, the dismissal of Mrs. Miller's appeal in the circuit court, and the agreed judgment annulling said will, etc., were each and all obtained "by fraud and management," etc. Issue was joined and proof taken, and upon the hearing of the cause the lower court, by its judgment, sustained the prayer of the petition. From that judgment appellants have appealed to this court.

The pleadings and evidence in the cause establish the following series of facts incontrovertibly, which bristle with fraud:

1st. After the death of the testator and the contents of the will had been made known the direct devisees named in the will, the executors being of the number, and Brookie, Wills and Searcy, without regard to the rights of the contingent devisees, who were minors, by a written agreement, signed by all of them, agreed to "destroy" said will and distribute said estate among the children of the testator according to the laws of general descent.

2d. Afterwards said executors presented said will for probate to the Anderson County Court, but offered no proof as to the proper execution of the will, nor of the competency of the tes-

tator to make it. On the contrary thereof the county judge was informed that the devisees had all, by a writing, agreed to set aside the will and let the estate pass by the laws of descent, whereby he was induced to order the rejection of the will. All of the devisees, Brookie, Wills, etc., being spokesmen, concurred in this proceeding and aided it.

3d. The legacy of Mrs. Miller, the widow, being affected by the rejection of the will, she appealed from the order of the county court rejecting the will to the circuit court. Thereupon Brookie and Wills paid her the sum of \$500, which she was not entitled to under the will, and her attorney's fees, to dismiss the appeal absolutely. Said executors and the other devisees aided and abetted in this proceeding.

4th. Nearly a year afterwards said executors took an appeal to the Anderson Circuit Court from the order of the county court rejecting said will. Portwood being paid his costs and attorney's fee by Wills, there was an agreed judgment entered in the circuit court affirming the order of the county court rejecting the will, and declaring it null and good for nothing. This was done without a trial or an investigation of any sort, but agreed to harmoniously all around.

5th. In this last appeal some of the infant contingent devisees were made parties, but always by their next, nearest and dearest friend, Brookie, to guard and protect their interest against the tricks and wiles of mercenary schemers and plotters.

The foregoing facts show that Brookie, Wills, Searcy and Portwood, the first-named three being very much angered because they were so decidedly discriminated against in the will, started out with the determination of breaking it at all hazard, whether fair or foul, but why the sons of A. Miller should join in the enterprise is difficult to comprehend, unless it was for the purpose, as one of them intimates, of keeping peace in the family, and stopping some reports circulated about their father by Brookie; damaging to his memory as an honest man.

The General Statutes, chapter 29, article 13, section 1, provides that "if any person fraudulently destroy or conceal a

will or codicil, with intent to prevent the probate thereof, he shall be confined in the penitentiary," etc.

Here while the parties, it seems, did not agree to "destroy" the will in the sense of separating its constituent parts or by annihilating it, yet they did fraudulently agree to destroy or suppress it by the aid of the courts, and, pursuant to that agreement, they obtained orders and judgments of the courts by disingenuous and fraudulent practices to meet and guard every conceivable phase of their enterprise: First, the order of the county court rejecting the will; second, the dismissal of Mrs. Miller's appeal; third, as the last and crowning act, the agreed judgment of the circuit court declaring the will null and of no effect.

To accomplish the destruction of the will, which would have been a penitentiary offense in the one case, they veered around by going through the farce of court proceedings.

But without reference to the analogy furnished by the statute, it is well settled that to destroy or suppress a written instrument for the purpose of hindering or defeating the rights of others, however innocent the motive, is at least a constructive fraud upon the rights of such persons.

Also if such destruction or suppression is done with a wrong motive, then the fraud is actual.

Also when such instrument has been intentionally destroyed or suppressed, everything will be presumed against the party by whom the destruction or suppression has been done.

For the foregoing reasons it seems to us clear that the order of the county court rejecting said will; the dismissal of Mrs. Miller's appeal in the circuit court; the agreed judgment in the circuit court annulling and declaring said will of no effect, were all obtained by fraud. The lower court, therefore, rendered a correct judgment.

It is contended, however, that the plaintiffs in the lower court, not having any beneficial interest under the will, had no right to bring the suit. Also Portwood, having been a party to said agreement, and all of the orders and judgments of the

courts, is estopped, not being himself defrauded, to assail them. Were he suing in his individual right the question of estoppel would be worthy of consideration.

Here, however, he is one of the executors of said will, as he was at the time he entered into said agreement, and helped to obtain said fraudulent orders and judgments, by doing which he violated a high and delicate trust reposed in him by A. Miller. It was his duty to use all honest and reasonable means within his power to have that will probated, and to execute its provisions, after probate, honestly and to the best of his ability, and not directly or indirectly to throw any obstacle in the way of probating it, or the faithful administration of it according to its letter and spirit.

His antagonizing, by his conduct, any of these duties was a fraud upon the will and against public policy.

Instead, therefore, of a court of equity applying the gag of estoppel to him, it will encourage him to open his mouth and cast out the wrong he has done the estate that he was under a solemn and sacred obligation to protect, and resume his fiducial relations to it as an honest man.

The judgment of the lower court is affirmed.

Thos. C. Bell and E. M. Wallace for appellants.

W. Lindsay for appellee.

SOUTH COVINGTON & CINCINNATI ST. RAILWAY CO.
v. WARE.

(Filed September 25, 1886.)

1. Contributory negligence—The right of a person to recover damages for a personal injury is not affected by his having contributed to it unless he was in fault in so doing. One who, through the negligence or fault of another, is put in a position of immediate danger is not bound to exercise all the prudence and care that ordinarily characterizes the conduct of a prudent man: he has no right, however, upon the happening of some occurrence, such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it.

In this case the question was properly submitted to the jury whether, under the circumstances the party acted rashly, and under an undue apprehension of danger.

2. **Special damage**—When a person seeks to recover damages for a personal injury he must aver special damage in order to recover any money expended by him or debt created on account of the injury.

3. **Excessive verdict**—While the verdict of a jury should not be interfered with upon the ground that it is excessive, unless it is flagrantly so, the court holds that a verdict for \$4,000 in this case is flagrantly excessive, and requires a reversal.

The small bone of the plaintiff's leg was fractured at the ankle, and some of the ligaments were ruptured. In consequence of this he was laid up not over eight weeks. The fracture has united perfectly, and will never trouble him; the ligaments have not healed entirely, but will not trouble him save in going up or down hill or when there is a change of weather, and then he will feel like one with a sprained ankle. No special damage was averred and no circumstances of aggravation shown. Held—That a verdict for \$4,000 is disproportionate to the injury.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

The right of a person to recover damages for a personal injury is not affected by his having contributed to it unless he was in fault in so doing. He may indeed not only contribute to it, but be the immediate cause of it, and yet recover. Thus if a passenger, under a reasonable apprehension that a collision or other accident is imminent, changes his position to one in fact more dangerous, or even leaps from the vehicle while in motion, yet he may recover damages if he be injured; and this is true even though it may afterward appear that if he had sat still he would not have been injured.

One is not bound under such circumstances to exercise all the prudence and care that ordinarily characterizes the conduct of a prudent man.

Thompson on Negligence, volume 2, page 1092, says: "If A, through his negligence or fault, put B in a position of immediate danger, real or apparent, and B, through a sudden impulse of fear, makes a movement to escape the danger, and in doing so accidentally receives another and different injury from that threatened by the negligence of A, he may recover damages of A, for A's negligence or fault is the proximate cause of the injury. Thus a coach suddenly breaks down,

going at a moderate gait on a level road. A passenger seated upon the top becomes alarmed, leaps to the ground and thereby sustains an injury. If he had have remained seated he would not have been injured. The breaking of the coach is the proximate cause of the injury, and if this happened through the negligence of the proprietor he must pay damages; otherwise not. A fortiori, if the negligence of B compels A to adopt a peculiar course, which he would not have adopted but for such negligence, and in so acting with ordinary prudence A is injured, he may recover damages of B."

It is urged that when one is frightened by something resulting from the neglect of the carrier, he can not be charged with contributory neglect to any extent.

He, however, must act upon a reasonable apprehension of peril. His conduct must conform to that of an ordinarily careful man under like circumstances. He has no right, upon the happening of some trivial occurrence, or such as would not create fear or apprehension of injury in the mind of an ordinarily prudent and careful person, to bring injury upon himself, and then recover damages by reason of it.

This rule is sustained by both reason and precedent.

The Supreme Court of the United States, in the case of *Stokes v. Saltonstall*, 13 Peters, 191, said:

"But if the want of proper skill or care of the driver placed the passengers in a state of peril, and they had at that time a reasonable ground for supposing that the stage would upset, or that the driver was incapable of managing his horses, the plaintiff is entitled to recover, although the jury may believe from the position in which the stage was placed by the negligence of the driver the attempt of the plaintiff or his wife to escape may have increased the peril, or even caused the stage to upset; and although they may also find that the plaintiff and his wife would probably have sustained little or no injury if they had remained in the stage."

Mr. Pierce states the rule thus: "If, through the default of the company or of its servants, the passenger is placed in such

a perilous condition as to render it an act of reasonable precaution, for the purpose of self-preservation, to leap from the cars, the company is responsible for the injury he receives thereby, although if he had remained in the cars he would not have been injured."

The same doctrine is announced in the cases of *Railroad v. Paulk*, 24 Geo., 356; *Railroad v. Morris*, 31 Grattan, 200; *Frink, &c. v. Potter*, 17 Ill., 406.

The character of the impending danger, or at least its apparent character, is to be considered.

If one acts unreasonably rashly or becomes frightened at a trivial occurrence, which would not alarm a reasonably prudent man, and thereupon brings injury upon himself, then there would be no liability.

Thus if one were to throw himself under the wheels of a stage upon the happening of some circumstance not of a character to alarm a reasonably prudent man, its owner would not be liable. The question must be submitted to the jury whether, under the circumstances, the party acted rashly and under an undue apprehension of danger.

We think this was done in this instance, when the third instruction given at the instance of the appellee and the fourth one of the appellant are considered together. The law of the case would have been more succinctly stated, and less calculated to mislead the jury, if the two instructions had been blended in one; thus if that given for the appellee had embraced the idea that the circumstances must have been such, or apparently such, as to induce a reasonably prudent man to do as the appellee did do, it would have correctly and fully presented the law of the case upon this point.

The first instruction given at the instance of the appellee does not assume, as the counsel for appellant supposes, negligence upon the part of its agent. It would have done so if the word "negligently," of the use of which he complains, had not been inserted.

The only remaining question is, whether the finding is so excessive as to require a reversal. Its consideration requires a brief statement of the facts of the case.

The appellee was a passenger upon a street car of the appellant, passing over the suspension bridge from Cincinnati to Covington.

The driver upon appellant's cars acts both as such and as conductor:

It appears that he can reasonably do so, as he collects the passenger fare while the car is making the ascent to the crown of the bridge, and then resumes his place at the reins and brake of his car. The appellee, owing to the car being crowded, was standing upon the rear platform of it, with one foot upon the step. It had passed the crown of the bridge, and was descending upon the Covington side. Just behind it was another car of the appellant, which had just turned the crown of the bridge, and as it did so the driver of it was not upon the front platform at the brake, with the reins in his hands, but inside of the car, presumably yet engaged in collecting the fare of the passengers. In consequence of this his horses started down the incline of the bridge, as some of the witnesses say, in a fast walk, but as others testify in a trot, and the latter are probably correct. The rear car approached so near to the front one, as the burden of the testimony shows, that the tongue was over the tail board of the platform upon which appellee was standing, and, as he testifies, struck him in the breast. Whether it did strike him or not is quite doubtful from the testimony, but in any event he does not complain of any injury on this account.

Alarmed by the proximity of the rear car, he either stepped or jumped off, and in doing so fractured the fibula or small bone of the leg at the ankle, and ruptured some of the ligaments. In consequence of this he was laid up for not over eight weeks, a physician attending him at least a part of the time. The testimony introduced by himself shows clearly that the fracture has united perfectly and will never trouble

him; but that the ligaments have not healed entirely, but will not trouble him save in going up or down hill, or when there is a change of weather, and then he will feel like one with a sprained ankle. This is all of it as shown by the entire testimony. The jury returned a verdict for \$4,000.

A long line of decisions has established the rule that the verdict of a jury should not be interfered with upon the ground that it is excessive, unless flagrantly so; and this court has the highest regard for the province of the jury, but is not this verdict open to this objection?

We doubt if a case can be found where a verdict for so large a sum has been sustained upon such circumstances as appear in this case, and where the injury was as slight.

It is noticeable that the petition does not aver any special damage. It only proceeds for the injury. The appellee could not, therefore, recover any money expended by him, or debt created on account of it. (Newman's Plead. and Practice, page 411.)

It is true that upon the trial he was allowed to prove, without objection, that while he was laid up a flood came in the Ohio river, by which he was damaged \$3,000; and that he lost business by being confined on account of the injury. These losses were not, however, sued for; and while we can not reverse the judgment by reason of this testimony, as no objection was made to it, nor by reason of the probable fact that the verdict was based largely upon it, yet we may consider it in arriving at a correct conclusion of the question we are now considering.

The counsel for the appellee say: "The appellant, without objection or exception, for effort to rebut, accepted appellee's own testimony that his financial damage was \$3,000, not including his unquestionable medical bill of \$500. The verdict of \$4,000, therefore, gives only \$500 for the pain and permanent injury which certainly exists."

The "financial damage" and medical bill were not in question, however; the appellee neither asserted them nor attempted it; it was probata without allegata; he only proceeded for the

injury. We must, therefore, assume that the entire sum found was for the injury; and the verdict, of course, does not show otherwise.

It seems to us that it must strike every unprejudiced mind that the one is greatly disproportioned to the other. There were no circumstances of aggravation connected with the injury; it was not the result of willful or intentional neglect, or such as flows from bad faith of a quasi criminal character.

The lasting effect of the injury is at most but slight, not interfering with the power of the appellee to earn a living or transact any business; and upon a careful consideration of all the testimony and circumstances of the case the verdict can but be regarded as so flagrantly excessive as to demand the interposition of an appellate tribunal.

Judgment reversed and cause remanded, with directions to permit the appellee to plead any proper special damage, if he desires to do so, and for further proceedings in accordance with this opinion.

W. W. Cleary and John C. Benton for appellant.

Hallam & Myers for appellee.

ROBERTS v. RIGGS & SMITH.

(Filed September 21, 1886.)

1. Homestead—Mechanic's lien—The release or waiver of the homestead exemption, to be valid as against a mechanic's lien for additional improvements, must be in writing, "subscribed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate;" otherwise the lien of the mechanic is subordinate to the right of homestead. A different question, however, is presented where the lot had been vacant when the mechanic entered upon it to make the improvement, and the improvement created the homestead.

2. Married women—Mechanic's lien—To entitle a mechanic to a lien upon the general estate of a married woman for improvements thereon he must allege that the improvement was necessary for the comfort of the wife and her family.

Appeal from Campbell Chancery Court.

Opinion of the court by Chief Justice Pryor.

We infer from the pleadings and contract in this case that the lot in controversy belonged to the wife; if so, the petition is fatally defective in not alleging that the improvement on the property was necessary for the comfort of the wife and her family, as the feme, by an express statutory provision, can not bind her general estate in any other way. There is neither allegation nor proof on the subject. The case of *Pell v. Cole*, 2 Met., 252, is directly in point, where this court held it was necessary to allege that the addition to the home was necessary for the comfort and shelter of the family, etc.

The fact that the wife approved the work and received it can make no difference; the statute fixes her liability, and by its provisions it must be determined.

Besides, if belonging to the husband and wife jointly, or to either of them, they were living upon the lot at the time this debt was created, and were entitled to a homestead. There is but one way in which this right can be waived, and that is pointed out by the statute, as has been often held by this court. The mechanic has a lien for his labor and improvements, but, like every other lien, if not created in the manner pointed out by the statute, it will not deprive the owner of his right to a homestead.

The release or waiver must be in writing, "signed by the defendant and his wife, and acknowledged and recorded in the same manner as conveyances of real estate." It results, therefore, that the lien of the mechanic is subordinate to the right of homestead, and while he must have pay for his improvements, in the event the property belongs to the wife and the improvement is necessary for her comfort, the value of the homestead must be first set apart as directed by the statute; and if the property belongs to the husband the same rule should prevail, except that the necessity for the improvement is not then involved.

This improvement for which the lien is asserted was but an

additional building to the house at the time occupied as a homestead, and whether belonging to husband or wife the right to a homestead has never been parted with. If the husband had mortgaged the lot (owning it in his own right) to secure the mechanic, the lien would exist, but not superior to the claim of homestead, because not released or waived as pointed out by the statute. The right of homestead existed when the mechanic entered upon the lot to make the additional improvement, and while the law gives him a lien, it also gives the owner the right to a homestead over all claims created subsequent to its existence, unless the right is waived in a particular way, or the claim is that of a vendor's lien. If the lot had been vacant and the appellee had erected a building, thereby creating the homestead, and the owner had removed to it, a different question would have been presented. Then the mechanic's lien would have had the preference.

It is not necessary to notice the other questions raised except to say that the manner of the work was put in issue by the reply, and the trial was, therefore, premature.

The judgments in rem and personam are both reversed and remanded for proceedings consistent with this opinion.

Chas. J. Helm for appellant.

Nelson & Washington for appellees.

WADDELL v. COMMONWEALTH.

FLEMING v. SAME.

TAYLOR v. SAME.

(Filed September 25, 1886.)

1. Repeal of statutes—Effect of—The provision of the General Statutes that “no new law shall be construed to repeal a former law as to any offense committed against the former law,” etc., is to be regarded as a limitation upon the effect of the act of March 25, 1886, amending the gaming laws and making certain offenses felonies instead of misdemeanors, in so far as that act operates as a repeal of former laws. The provision of the General Statutes quoted is not to be regarded as itself repealed by the act of March 25, 1886, although that act provides that “all acts and parts of acts in conflict with this act are repealed.”

Therefore, one who committed the offense of "setting up, exhibiting and keeping a faro bank" prior to the act of March 25, 1886, may still be convicted and punished, although the law under which the offense was committed has been repealed.

2. Whenever the offense charged in an indictment under section 6, article 1, chapter 47, General Statutes, is for setting up, exhibiting and keeping some machine or contrivance not specially mentioned and designated in the statute, nor the purpose for which it is ordinarily used otherwise indicated, it is necessary to allege that the contrivance was one "whereby money or property or other thing is or may be won or lost," or to describe it by the use of equivalent words; but where the contrivance was a faro bank it is sufficient to simply allege that it was set up, exhibited and kept, without adding any words descriptive or explanatory of the purpose for which it was or may be used, the faro bank being mentioned in the statute by name.

Appeals from Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

As the convictions in all these cases were under section 6, article 1, chapter 47, General Statutes, for the offense of setting up, exhibiting and keeping a faro bank, and the same questions are presented in each of them, they will be considered together.

The part of the section applicable is as follows: "Whoever shall set up, exhibit or keep, for himself or another, or shall procure to be set up, exhibited or kept, any faro bank, gaming table, machine or contrivance used in betting, or other game of chance, whereby money or other thing is or may be won or lost, shall be fined \$500 and costs, and imprisoned until the same be paid, or imprisoned not more than one year, or both so fined and imprisoned; shall be deemed infamous after conviction, and be forever thereafter disqualified from exercising the right of suffrage, and from holding any office of honor, trust or profit."

Under that section it is made an offense for a person to set up, exhibit or keep any machine or contrivance that, in the language of this court, in *Ritte v. Commonwealth*, 18 B. M., 25, "is ordinarily used for gambling for money or property." And it is not, therefore, necessary, as counsel contends, to charge in an indictment for any such offense, or to prove on

the trial, that money or other thing was, on any particular occasion, actually won or lost thereby.

Nor was it even necessary, as is argued, that the indictments in these cases should have contained the words "whereby money or property or other thing is or may be won or lost," or any other words of like import.

Whenever the offense charged in an indictment under that section is for setting up, exhibiting and keeping some machine or contrivance, not specially mentioned and designated, nor the purpose for which it is ordinarily used otherwise indicated, it becomes necessary to use the words just quoted, or those which are equivalent, in order to show that the offense charged belongs to the class of offenses therein denounced. But the faro bank being mentioned in the section by name, it is sufficient to simply allege in the indictment that it was set up, exhibited and kept, without adding any words descriptive or explanatory of the purpose for which it was, or may be, used. And this distinction has been practically made by this court in the case of *Commonwealth v. Monarch*, 6 Bush, 298, cited by counsel. There this language was used: "The statute denounces by name the setting up and keeping a faro bank at which money is won and lost; therefore, a legal signification is given to that contrivance, and it is specially prohibited. But not so as to the keno table; this is denounced under the general prohibition of all contrivances set up for the purposes of gambling, and, not being named, some averment showing it to be within this general prohibition is essential."

In our opinion, therefore, the charge in the indictments in these cases that each of the defendants set up, exhibited and kept a faro bank is all that, in the meaning or according to a grammatical construction of the statute, is required to make a complete offense, and any more would be useless amplification. Consequently the demurrers to the indictments were properly overruled.

But March 25, 1886, which was after the indictments in these cases were found, though before the judgments appealed

from were rendered, an act of the general assembly, entitled "An act to amend article 1 of chapter 47, entitled 'Gaming,' of the General Statutes," was passed and approved. By that act the section we have been considering was so amended as to make the offenses therein described felonies instead of misdemeanors, and fixing the punishment in each case at confinement in the penitentiary not less than one nor more than three years, instead of confinement, at the discretion of the jury, in the county jails not more than one year.

Section 6 of that act is as follows: "All acts and parts of acts in conflict with this act are repealed." And by section 7 it is provided the act shall take effect from its passage.

It is, therefore, contended that the law under which appellants were convicted has been repealed, and as a consequence no judgment can now be rendered against them.

It has been often and uniformly held by this court that no judgment of conviction can be rendered for a violation of a criminal law which has expired or been absolutely repealed before judgment. And without question if section 6 of the act of March 25, 1886, be interpreted literally and without reference to the legislative intent, or the true reason for the passage of the act, or the nature and effect of other existing statutes, the law under which the judgments in these cases were rendered must be regarded as repealed, without any limitation of the effect of such repeal.

But at the time the act of March 25, 1886, was passed section 23, chapter 21 of the General Statutes, was in full force, which is as follows: "No new law shall be construed to repeal a former law, as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter had shall conform, so far as practicable, to the laws in force at the time of such proceedings. If any pen-

alty, forfeiture or punishment be mitigated by any provision of the new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect."

If that section remains unrepealed and unaffected, and can be in any sense made applicable in arriving at the legislative intent in the passage of the act of March 25, 1886, it seems to us no argument is needed to show that the law under which appellants were indicted and convicted should be held unrepealed as to the offenses with which they are, in these cases, charged, for it is in plain and unambiguous terms so provided.

The main question then is whether chapter 21, General Statutes, remains in full force, notwithstanding the act of March, 1886.

The repealing section of that act in terms applies to only such acts or parts of acts as are in direct conflict with it. And in our opinion it neither does in terms or by implication, nor was intended, to impair the force or in any way affect chapter 21.

Both the act of 1886 and chapter 21 being then in full force at the time the judgments of conviction in these cases were rendered, the court has no power to wholly disregard either, but they must be construed together as parts of the same system of laws, and reconciled if it be possible.

There are two conclusive reasons showing the legislature intended to limit the effect of the repealing section of the act of 1886.

In the first place it can not be supposed that the legislature, by an act passed for the purpose of more effectually suppressing and more severely punishing the offense of gaming, intended to relieve altogether persons then under indictment, and who might be thereafter found guilty of the offense.

In the second place the provision of section 23, chapter 21, has been in force for many years; had become the settled policy of the State, and in the case of *Acree & Kinman v. Commonwealth*, 13 Bush, 353, its validity and effect upon subsequent acts of the legislature had been directly passed on and recognized by this court.

The act of 1886, we think, must, therefore, be presumed to have been passed, and the repealing section thereof adopted, not only in view of the existence of section 23, chapter 21, General Statutes, but with the intent that its effect should be limited thereby.

That section 23, chapter 21, is within the general rule of interpretation requiring existing laws to be interpreted together is beyond question. (Bishop on Statutory Crimes, section 179, and authorities there cited.)

In our opinion the law under which appellants were indicted and convicted was not repealed as to the offenses charged in these cases. And as there is no error in the record of either case the judgment in each must be affirmed, with damages.

Kohn & Barker and Frank Hagan for appellants.

P. W. Hardin, A. G. Caruth and B. W. Duke for appellee.

COURT OF APPEALS ABSTRACTS.

FOX v. COMMONWEALTH.

Filed September 9, 1886. Appeal from Owsley Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

Practice—Impeachment of witness—Where there is an attempt to impeach a witness by showing his general bad character, the cross-examination may draw from the impeaching witness his means of knowing the general character of the witness whose character is assailed, but it is improper to allow the impeaching witness to be asked upon cross-examination if he has any personal knowledge of any act constituting the bad character of the assailed witness, and such an error was in this case prejudicial.

Wm. Lindsay and A. H. Clark for appellant.

P. W. Hardin for appellee.

HOLCOMB v. HOOD.

Filed September 9, 1886. Appeal from Greenup Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Homestead—Pleading—In an action by a debtor to recover his land which has been sold under execution, upon the ground that he was entitled to it as a homestead at the time of the sale, it is not necessary that he should allege in his petition that the debt for the satisfaction of which the land was sold was created subsequent to the acquisition by him of the land; a prima facie right to the exemption is established by alleging that he was at the time of the sale an actual bona fide housekeeper, with a family, occupying and claiming the land as a homestead.

2. Where a debtor has acquired land by gift he is entitled to homestead therein, although the debt to which it is sought to be subjected existed prior to its acquisition. The provision of the statute that a debtor shall not be entitled to a homestead if the debt for which the land is sought to be sold existed prior to its purchase, does not apply where the land has been acquired by gift.

Roe & Roe for appellant.

Thomas H. Paynter for appellee.

LUCKETT, &c. v. BUCKMAN, &c.

Filed September 9, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Holt, affirming; Judge Lewis, dissenting.

1. One acting in one right can not be benefited or injured by a judgment for or against him when acting in some other right.

Two of the trustees of a school district were sued as individuals jointly with others for an alleged trespass to land. The defendants to that action pleaded liberum tenementum, and whether the close belonged to the school district or to the plaintiffs in that suit was in issue. The plaintiffs recovered judgment. Held—That the judgment is not a bar to an action by the

school district to recover the land, the title to which was an issue in that action as the trustees, as such, were not parties to that action.

2. Prior to the amendment of May 15, 1886, to section 553 of the Civil Code, the deposition of a witness could not be retaken without leave, although in rebuttal.

Rountree & Lisle for appellants.

Hill & Rives for appellees.

HUGHES v. SWOPE.

Filed September 9, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Bennett, reversing.

1. Appellate jurisdiction—The Court of Appeals has jurisdiction where either the legal or equitable title to land is involved, however small the interest.

2. Title of purchaser at judicial sale—A purchaser at decretal sale is at once vested with the equitable title, and is not merely a preferred bidder. Therefore, the Court of Appeals has jurisdiction of an appeal by a purchaser from a judgment setting aside the sale at which he purchased, although his bid was less than \$100.

3. Time allowed by commissioner for execution of bond—While it is the duty of the commissioner making a sale to allow a reasonable time to the purchaser to prepare his bond and get his sureties together for the purpose of signing it, the commissioner must, if necessary, be the judge of the length of time he will give, which will depend on the probability of the purchaser's being able to make a good bond and other circumstances.

In this case the commissioner did not act improperly in reselling the property upon the failure of the first purchaser, who was insolvent, to give bond on the day of sale as he was notified that he must do, the commissioner having no assurance that he would be able to make a good bond on a subsequent day as he promised to do. The court, therefore, erred in setting aside the second sale and accepting the bond of the first purchaser executed by him after the resale, and the execution of bond by the second purchaser.

Wilfred Carrico for appellant.

G. W. Swope for appellee.

BELY v. KELLER.

Filed September 16, 1886. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Pryor, reversing.

Vendor and vendee—Fraud—Rescission—Where a vendee, after living for fifteen months upon the land he had purchased, executed his note to the vendor for the balance of the purchase price without making any claim that he had been imposed upon, in an action on the note it was too late for the court to go back to the original contract and adjudge fraud by reason of the fact that the vendor erred in his opinion as to value, although the vendee was a young and confiding German, totally unacquainted with the value of land in this country, and may have relied solely on the judgment of the vendor.

L. T. Applegate for appellant.

C. H. Lee and J. H. Barker for appellee.

KENTUCKY ECLECTIC INSTITUTE v. GAINES.

Filed September 16, 1886. Appeal from Franklin Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Petition on promissory note—In an action upon a promissory note the averment in the petition of the date at which the note was payable, followed by the averment that the defendant by said note agreed and promised to pay the sum therein specified, ascertains and fixes the time when the promise was to be performed.

2. Vendor's lien—Pleading—To create a vendor's lien under the Revised Statutes it was sufficient to state in the deed what part of the consideration remained unpaid, therefore, in an action to enforce such a lien it is sufficient to state the amount of the deferred payments and aver that this amount was set forth in the deed.

3. Amended petition—Process—Process should be issued on an amended petition and served on the defendant whenever the amendment contains a new cause of action distinct from that of the original petition, and of which the defendant could not be apprised by an inspection of the original petition.

The fact that the amendment was filed subsequent to an appeal upon which the Court of Appeals gave the plaintiff leave to amend his petition upon the return of the case does not dispense with the necessity of summons on the amendment where it sets up a new cause of action not previously considered by either court.

In this case a judgment decreeing a sale of property to satisfy a vendor's lien was reversed because of a defect in the petition, and upon the return of the case the plaintiff filed an amended petition, alleging that during the possession by him of the property between the time of the sale under the first judgment, when he became the purchaser, and the time when the sale was, in pursuance of the mandate of the Court of Appeals, set aside, he collected rents amounting to a certain sum, for which he offered to account, but stated that during the same period he paid out a certain amount for taxes, insurance and repairs, which he asked to have deducted from the rents.

Held—That process on the amended petition was necessary.

W. P. D. Bush for appellant.

A. Duvall and Ira Julian for appellee.

FERGUSON v. COMMONWEALTH.

Filed September 16, 1886. Appeal from Ohio Circuit Court. Opinion of the court by Judge Holt, reversing.

An indictment, either for false swearing or for perjury, must negative by special averment the matter alleged to have been sworn to by the accused. It is not sufficient to allege in general terms that it is false. Nor is it material whether the accused is charged with having sworn affirmatively or negatively to a matter. In either case the same rule of pleading applies.

Sam E. Hill for appellant.

P. W. Hardin for appellee.

HIGHBAUGH v. HIGHBAUGH'S EX'ORS.

Filed September 16, 1886. Appeal from Hart Circuit Court. Opinion of the court by Judge Holt, affirming.

Wills—Failure to devise—Costs of administration—Where a devise has been adeemed by the act of the testator the property embraced therein passes as in case of intestacy and is not included in the residuary devise unless a contrary intention appears by the will, and it is proper that the costs of administration should first be paid out of such devise instead of out of the residuary.

D. H. Smith for appellant.

BURCHET v. COMMONWEALTH.

Filed September 18, 1886. Appeal from Carter Criminal Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Criminal law—Instruction as to malice—Although the lower court erred in giving an instruction attempting to define malice, this court will not reverse for that error, as the substantial rights of the accused were not prejudiced, the killing being clearly established and not a mitigating circumstance offered in excuse therefor.

2. Intoxication no excuse for crime—Intoxication is no excuse for crime, nor does it lower the degree of the offense.

3. It is no excuse for a killing that the person shot at and killed was supposed by the person shooting to be another person, nor is that fact sufficient to reduce the offense from murder to manslaughter.

Pritchard & Cobb for appellant.

P. W. Hardin for appellee.

DAVIS v. JUSTICE, &c.

SAME v. SAME.

Filed September 18, 1886. Appeals from Johnson Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Wills—Power of chancellor to reform—The fact that prior to the execution of a will one of the devisees had refused to accept from the testator a deed to land which he subsequently accepted will not authorize the chancellor to reform the will upon the plea that if the testator had known the deed would be accepted the devise would not have been made. The devise being absolute and unconditional the chancellor is powerless to grant relief.

2. Action for recovery of land—Where one seeks to recover land in the possession of the defendant who claims to hold adversely he must show title in himself authorizing the recovery.

W. C. Ireland for appellant.

J. E. Stewart for appellee.

SKINNER v. CHADWELL.

ROGERS v. MASTERSON, &c.

Filed September 18, 1886. Appeals from Carroll Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Homestead—Proceeds exempt—The proceeds of one's homestead can not be subjected to the payment of his debts.

Winslow & Winslow for appellants.

Geo. C. Drane for appellees.

THE BROOKS—WATERFIELD CO. v. BUSH.

Filed September 18, 1886. Appeal from Henry Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Vendor can not disparage title—A vendor can not disparage the title to property which he has sold.

2. Equitable title good against attachment—An equitable title acquired before the levy of an attachment upon the property as that of the vendor is valid as against the attachment.

Carroll & Barbour for appellant.

Masterson & Carroll for appellee.

ATCHISON, ASS'EE v. JONES & HALSEY, ASS'EEs.

Filed September 11, 1886. Appeal from Davless Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Actions—Misjoinder—An action by an assignee for the benefit of creditors to recover the possession of personal property can not be united in an action by him to settle and distribute the estate of his assignor.

2. Lien on tobacco for advances—A firm to which tobacco had been consigned for the purpose of securing advances made by them thereon, having made an assignment for the benefit of creditors, their assignee had the right to hold the tobacco for the purpose of securing the advances against the assignee of the consignor, who, subsequent to the consignment, had also made an assignment for the benefit of creditors.

3. Negotiable instruments—Indebtedness of acceptor presumed—In the absence of proof the legal presumption is that the acceptance of a bill is on account of an indebtedness of the acceptor to the drawer and not for the drawer's accommodation.

4. Distribution of assigned estate—S. & Co., having made an assignment for the benefit of creditors, in an action by their assignees to settle and distribute their estate the assignees paid out by order of court a large sum of money on account of bills drawn or accepted by S. & Co. for the accommodation of B. B., having subsequently made an assignment for the benefit of creditors, in an action by his assignee for the settlement and distribution of his estate, the assignees of S. & Co. asserted a claim for the amount paid by order of court on these bills, for which the court gave judgment directing its payment pro rata with B.'s general creditors. Held—That this was proper, B.'s assignee not being entitled, as contended by him, to retain this amount to satisfy the balance due the holders of the bills upon which the assignee of S. & Co. had made partial payments.

W. N. Sweeney & Sons, Weir, Weir & Walker and Stuart & Atchison for appellant.

Williams & Powers for appellees.

McKINNEY v. CRADY, &c.

Filed September 11, 1886. Appeal from Larue Circuit Court. Opinion of the court by Judge Holt, affirming.

Vendor and vendee—Rescission—Inadequacy of price is not in itself sufficient to authorize the rescission of a contract for the sale of lands; to authorize such relief the inadequacy of price must be accompanied with weakness of mind in the party asking relief, or with pecuniary distress or circumstances of fraud, none of which appear in this case. Moreover, the

lien which the vendee would have upon the property for what he paid for it would consume it, leaving nothing for the vendor.

J. P. Hobson for appellant.

Twyman & Gore for appellees.

HARDIN v. GROVER, &c.

Filed September 11, 1886. Appeal from Owen Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Fraudulent conveyance—Execution sale—Where land was sold under execution for less than two thirds of its value, and before the time for redemption expired the execution debtor sold and conveyed the land to his son, the title, as between the father and son, passed to the latter, and the sheriff having executions in his hands in favor of the creditors of both father and son which issued at the same time, had no right to determine the deed fraudulent as between these creditors, but properly levied on the property and sold it as the property of the son, and the title having passed to the purchaser, who had no notice of any fraud, the sheriff had no right thereafter to sell any part of it to satisfy the execution in favor of the creditor of the father.

John L. Scott for appellant.

Wm. Lindsay, N. G. Botts and A. Duvall for appellees.

SMITH & BREWSTER v. COMMONWEALTH.

Filed September 11, 1886. Appeal from Louisville City Court. Opinion of the court by Chief Justice Pryor, dismissing.

Appeals—Jurisdiction—An appeal does not lie directly to the Court of Appeals from an order of the Louisville City Court, disbarring nor suspending an attorney from practicing in that court.

Elliott & Hemingray, John J. McAfee and Joseph B. Read for appellants.

P. W. Hardin for appellee.

CUSTARD, &c. v. POSTEN, &c.

Filed September 14, 1886. Appeal from Clark Circuit Court. Opinion of the court by Judge Lewis, reversing.

Homestead—Exclusion of negro unconstitutional—The Homestead Act of 1866 was void under the Constitution of the United States in so far as it excluded negroes from its benefits.

W. M. Beckner for appellants.

Chas. Eginton and R. C. Gray for appellees.

GAFFNEY v. PENNSYLVANIA CO.

Filed September 14, 1886. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Bennett, affirming.

Appeals—What may be reviewed—In the absence of a motion for a new trial in a common law action, and of the evidence heard by the jury, the only question that can be reviewed on appeal is whether the pleadings state any cause of action or any defense.

Wm. Lindsay and O'Neal, Jackson & Phelps for appellant.

C. H. Gibson for appellee.

SANDERS v. BENNETT.

Filed September 21, 1886. Appeal from Taylor Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Infancy—Estoppel—Appellants instituted this action for a division of land left by their grandfather, claiming as heirs. The defense of appellee, a remote vendee, is that appellants sold and conveyed the land to their mother, who sold and conveyed to appellee's vendor more than fifteen years before this action was instituted. Appellants plead that the sale to their mother was by parol, and, further, that they were infants when they made the contract. Held—That the conveyance to appellants' mother is established by her testimony, although the deed was never recorded, and she says it has been lost, and it is now too late for appellants to avoid that conveyance by pleading their infancy, they having admitted to others that they had sold their interest to their mother.

Montague & Young for appellants.

T. J. Blevins for appellee.

**FARMERS AND TRADERS NATIONAL BANK v. LOVELL, &c.
HOMAN'S TRUSTEE v. FARMERS AND TRADERS NATIONAL
BANK, &c.**

Filed September 21, 1886. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bennett, affirming.

1. Assignment for benefit of creditors—Purchase of claims by assignor—One who has made an assignment for the benefit of his creditors can not be allowed to buy up his own indebtedness at a discount, or take it up dollar for dollar, and then have it allowed to him, and pro rate with his other creditors out of the estate he has assigned to them for the payment of his indebtedness. In this case, however, as certain creditors of the assignor released to his son their claims in consideration of his securing to them a certain per cent. thereof, and it does not appear that the assignor was in any way connected with the purchase of the claims, there is no reason why they should not be allowed to his son.

2. Limitation—An action upon a check, or upon a promissory note placed upon the footing of a bill of exchange, must be commenced within five years after the maturity of the check or note.

3. Conflict of laws—In an action upon a check or note the statutory bar of the State where the remedy is sought to be enforced by action, and not of the State where the contract was made, governs.

Hallam & Myers for the bank.

O'Hara & Bryan and W. E. Arthur for Lovell.

C. C. Cook and C. L. Raison, Jr., for Homan's trustee.

MORROW, TRUSTEE, &c. v. WESSELL, &c.

Filed September 23, 1886. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Lewis, affirming.

Judicial sale—Failure to object to confirmation—Estoppel—Although the purchaser at a judicial sale failed to object to the confirmation of the report

of sale, or to have the order of confirmation set aside during the term at which it was made, yet as he was induced to forego his right to have the order set aside by reason of the conduct and conversation of the plaintiffs, which were calculated to, and did, create the belief by the purchaser's attorney that the sale would not be insisted on, if, upon investigation, the plaintiffs had not the title to the land, the purchaser is entitled to have the collection of the sale bond enjoined, it appearing that the plaintiffs, who asked for a sale of the land that there might be a division of the proceeds, had no title thereto.

Morrow & Newell for appellants.

George E. Stone for appellees.

BEDFORD v. GRAVES.

Filed September 23, 1886. Appeal from Monroe Circuit Court. Opinion of the court by Judge Holt, affirming.

1. Pleading—Departure—Section 101 of the Civil Code, which provides that "a party shall not in a reply or subsequent pleading depart from a cause of action or a ground of defense stated by him in a previous pleading" does not apply to an amended answer. The word "subsequent" refers to a pleading subsequent in its character to a reply, and not to the time when it may be filed.

2. Amended pleading—Waiver of objection—Failure to object to the filing of an amended answer, or to move to strike it from the files, is a waiver of objection to it.

3. Resulting trusts—The statutory provision that when a deed is made to one person, and the consideration paid by another, no trust shall result in the latter's favor, does not apply where the grantee takes the deed without the consent of the one paying the consideration, or where the grantee, in violation of a trust, purchases the land with the means of another.

4. Statute of frauds—An agreement to hold land in trust for another is not within the statute of frauds.

John L. Scott and J. H. C. Sandidge for appellant.

Lewis McQuown for appellee.

PRYSE, &c. v. AUDITOR.

Filed September 25, 1886. Appeal from Franklin Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

School commissioner and sheriff—Sureties—By an arrangement with the auditor one who was both school commissioner and sheriff had his account as sheriff credited by the amount due the school fund, but never paid over any part of the school fund to those entitled thereto. His sureties as commissioner seek to compel the auditor, by mandamus, to transfer to the school fund the amount credited to their principal as sheriff, and to draw his warrant for that amount for the payment of those entitled thereto. Held—That while the court will see that this fund is paid to those entitled to it the sureties of the commissioner have no standing in court.

John L. Scott and Thos. B. Ford for appellants.

SPALDING, &c. v. BEMISS.

Filed September 25, 1886. Appeal from Nelson Circuit Court. Opinion of the court by Judge Bennett, reversing.

Injunction—Interference with easement in hall—Appellants and appellee own a house and lot in severalty. A hall opens on the street and runs back through the house. Appellants own the title to the whole of this hall in fee. Appellee owns an easement in the hall which consists of "the free use thereof, as far as the well on said lot for passing in and out." The lower front room of the part of the house owned by appellee is used as a saloon. Appellee has opened a door in the wall along the hall so as to furnish direct ingress and egress from the saloon into the hall. A front door to the saloon gives convenient ingress and egress from the street to the saloon, and also from the saloon into the hall. Appellee seeks to enjoin appellants from erecting in their hall a plank wall, parallel to this wall, and so close thereto as to prevent passage from his saloon directly to the hall.

Held—That appellee has no right to the hall except for convenient ingress and egress for himself, family and employes, together with such burdens and packages as they may have occasion to carry, and not as a thoroughfare for other persons indiscriminately. Therefore, as the wall proposed to be erected did not interfere with the right of appellee, the chancellor had no right to enjoin the erection of it.

C. T. Atkinson for appellants.

John H. Wathen for appellee.

SUPERIOR COURT ABSTRACTS.

WAKEFIELD v. REED'S EX'OR.

Filed September 17, 1886. Appeal from Washington Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Verdicts—The jury had the right to find both a general and a special verdict unless otherwise directed.

2. Joint principals—Sureties—In an action against appellant upon a promissory note, in which he pleaded as a set-off the amount paid by him on a note executed by him jointly with the plaintiff, the issue being as to whether appellant was a joint principal or a surety in that note, the court holds that the special verdict of the jury that he was a joint principal is against the evidence, and for that reason reverses the judgment.

W. E. Selecman, W. P. D. Bush and F. F. Bush for appellant.

John W. Lewis for appellee.

CITY OF OWENSBORO v. STIRMAN.

Filed September 17, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Municipal corporations—Salaries of officers—Under the charter of the city of Owensboro, which provides that the city council shall, at a certain time in each year, fix the salaries of the officers who are to be elected for the next ensuing year, and that the salaries so fixed shall not be increased or diminished during the term of office, the council had no authority to make an extra allowance to the city physician for attending small-pox patients, although he threatened to resign if the allowance was not made. the services being such as he was bound to perform by virtue of the acceptance of his office, therefore, the allowance having been paid, the city is entitled to recover the amount by setting it off against the officer's claim for an unpaid balance of salary.

2. Recovery of money paid by mistake—Where a city council has without authority made an allowance which has been paid, the city may recover the amount upon the ground that the action of the council was based upon a mistake of law.

R. W. Slack for appellant.

Weir, Weir & Walker for appellee.

CLEAVER v. PHILIPS, ADM'R.

Filed September 17, 1886. Appeal from Lincoln Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Appeals—Notice of filing schedule—Where the appellant chooses to file a partial transcript he must not only file his schedule, but must cause notice of the filing thereof to be served on the appellee.

W. E. Russell and J. D. Belden for appellant.

Rountree & Lisle for appellee.

THOMPSON'S ADM'R v. GEORGE.

Filed September 17, 1886. Appeal from McCracken Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Redelivery of satisfied note—After a note has been paid off and surrendered to the payee he may, upon the contracting of a new debt, redeliver the old note as evidence of it, and by a parol agreement to that effect give to it the same force as he could have given to a new note which he had signed and delivered.

2. Agreement to revive mortgage—After the satisfaction of the debt which a mortgage was executed to secure the mortgage can not be revived by a parol agreement, but must be reacknowledged and redelivered, although the satisfaction of the debt may not have been endorsed upon the margin of the record book in the county clerk's office, as such an endorsement adds no greater force to the release.

E. W. Bagby and C. S. Marshall for appellant.

Bigger & Reid for appellee.

COMMONWEALTH v. MIDDLETON.

Filed September 20, 1886. Appeal from Hart Circuit Court. Opinion of the court by Judge Barbour, affirming.

Indictment—Certainty—An indictment must set forth the offense with such certainty as to apprise the defendant of the nature of the accusation upon which he is to be tried, and to constitute a bar to any subsequent proceeding.

The indictment in this case, which charges the defendant with selling liquor "as a merchant so to do," does not accuse him of any offense.

P. W. Hardin, for appellant.

THOMAS v. EDMONSON COUNTY.

Filed September 20, 1886. Appeal from Warren Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Counties—Liability for expense of stamping out epidemics—To impose a liability upon a county for the expense of stamping out or preventing the spread of an epidemic disease, without regard to the ability of the persons treated to provide the treatment for themselves, it must be alleged that the State Board of Health had appointed a local board of health for the county, as provided by the act of April 2^d, 1880, and that the local board so constituted met and determined that it was necessary to take steps to prevent the spread of the disease, and directed the service to be rendered.

The allegation in this case that the services for which a recovery is sought were rendered by the plaintiff as a member of the board of health for the county does not authorize a recovery of the county, as it is not alleged that the plaintiff was ordered by the board to perform the services; moreover the allegation that the plaintiff was a member of the board is but the statement of a conclusion of law.

2. Duty of county to furnish medical aid—It is the duty of a county to furnish medical aid to its indigent citizens, but as there is no allegation in this case that the persons treated were indigent there can be no recovery on that ground.

ASHLEY v. MONARCH & MILLETT.

Filed September 8, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, dismissing.

Appeals—Jurisdiction—In a contract between an attaching creditor and a claimant of attached property the value of the property determines or fixes the amount in controversy, and this court has no jurisdiction of an appeal by the claimant from a judgment rejecting his claim in the absence of any allegation as to the value of the property at the time it was taken under the attachment. To give jurisdiction it must appear that the property was worth \$100 or more.

R. S. Todd for appellant.

W. N. Sweeney & Sons for appellees.

TANDY'S ASS'EE v. ROBBINS, WILLIS & CO.

Filed September 13, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Purchaser for value—An assignee for the benefit of creditors does not acquire the same right to the assigned property that a purchaser for value would. He takes only such rights as the debtor or assignor had at the time of the assignment.

2. Assignment for benefit of creditors—Affidavit and demand—In a suit to enforce a lien upon property assigned for the benefit of creditors generally, it is not necessary to make the affidavit or demand required by the statute as to claims against estates of deceased persons, or persons who have been proceeded against as insolvents, because of a preference of one creditor over others.

Thompson & McChord for appellant.

W. E. & S. A. Russell for appellees.

FIDLER v. DILS.

Filed September 13, 1886. Appeal from Pike Circuit Court. Opinion of the court by Judge Barbour, reversing.

Contracts—Statute of frauds—It is a good defense to an action upon a promissory note that, subsequent to the execution of the note, the plaintiff, for a sufficient consideration, agreed to accept payment in certain articles other than money, to be delivered as the plaintiff might call for them, and that the defendant is, and has been all the time, ready, able and willing to deliver the articles. Such a contract is not against public policy, nor is it within the statute of frauds as being an agreement not to be performed within a year; that it may be performed within a year is sufficient to take it out of the statute.

Auxier & Ferguson for appellant.

SWETMAN, &c. v. SWETMAN, &c.

Filed September 15, 1886. Appeal from Lawrence Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Parent and child—Stepfather and stepchildren—Where a stepfather has had the services of his stepchildren as he did those of his own children, and all lived together as one family, he can not fairly ask other compensation for their maintenance.

Alexander Lackey for appellants.

Wm. Lindsay for appellees.

SPALDING v. GHENT.

Filed September 15, 1886. Appeal from Greenup Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Sales of personal property—Remedies of vendor—Where the vendee of personal property refuses to receive it, one of the remedies of the vendor is to tender the property and treat it as the vendee's, subject to his call or order, and sue for the contract price, but in order to entitle him to this remedy he must, where the contract is an entirety, tender all the articles he agreed to deliver; he can not deliver a part and then sue for the contract price for the whole.

2. In this case, where the contract was to furnish a monument and several "markers" at an agreed price, a tender of the monument alone by the vendor, and the refusal of the vendee to accept it, did not entitle the vendor to sue for the contract price, nor did the failure of the vendee to furnish the inscriptions for the "markers" excuse the failure to tender them with the monument. Therefore, the vendor can recover only the difference between

the contract price and the value of the articles at the time and place they should have been delivered.

E. F. Dulin and E. C. Phister for appellant.

T. H. Paynter for appellee.

STRINGTOWN AND BEECHFORK TURNPIKE ROAD CO. v. RILEY.

Filed September 20, 1886. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Contract for construction of turnpike—Lien of contractor—Bills of exceptions—It was not proper for the court to submit to a jury to find what the contract between the parties was, since it was stated and admitted in the pleadings, and being in writing, was to be read and construed by the court, yet as the matter submitted and found by the jury was just what the court should have told them, the appellant was not prejudiced.

2. Where a contract for the construction of a turnpike provided for payments to the contractor as the work progressed, if the failure of the company to pay the estimates made by its engineer under the contract prevented the contractor from completing the work, he was entitled to recover for what he had done, the company having no right to insist on the completion of the work while disregarding its own duty to make payments.

3. Those who have performed labor and furnished materials in the construction of a turnpike are not entitled to a lien on the turnpike under chapter 70 of the General Statutes. A turnpike is not within the letter of the statute, and its nature and use are such that the words of the statute ought not to be extended so as to include it.

4. An agreement between the contractor and certain persons who performed labor for him, and who were stockholders, that the company should retain what was due them was not a contract which the company could enforce.

5. When the bill of exceptions states that the court was moved to instruct the jury as in a designated paper which contains several different propositions, the fact that any one of the various propositions is not law justifies the refusal of all, the motion being to give all of them as one instruction, and not several instructions written on one paper.

6. The bill of exceptions stated that the plaintiff moved the court to instruct the jury "as in paper marked W S," which was done. This paper contains two paragraphs numbered by the clerk on the margin as 2 and 3. The bill further shows that the defendant moved the court to instruct the jury "as in paper marked S B," which the court refused to do. This paper contains instructions marked by the clerk on the margin as "A. B. C and D" Held—That it appears that all instructions asked, given and refused are in the bill, and it is immaterial that the different propositions in the two papers are not lettered in the bill as they are in the grounds for a new trial.

John D. Wickliffe and N. W. Halstead for appellant.

John S. Kelley for appellee.

EDELEN, &c. v. BARBER.

Filed September 22, 1888. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Chancery practice—Referring questions of fact to jury—The matter of referring questions of fact in equity causes to a jury in aid of the chancellor is always addressed to his discretion, and this court will not undertake to control his action in that regard unless there has been a palpable abuse of discretion.

In a proceeding for an injunction it is solely within the province of the chancellor to determine all the facts which are essential to enable him to pass upon the question whether the injunction should be granted or refused.

2. Ordinance prohibiting building of privy does not entitle individual to injunction—The fact that an ordinance of a town prohibits the building or use of a privy within thirty feet of any dwelling without permission from the trustees, and authorizes the abatement of the privy as a nuisance upon the complaint of any citizen, does not give a party the right to an injunction to prohibit the building of a privy within thirty feet of his dwelling when he would not otherwise have had such a remedy.

3. Pleading—Argumentative denials—In a proceeding to enjoin the construction of a privy upon the ground that it would be a nuisance by reason of the foul air, noxious gases, etc., that would result from its use, the allegations of the defendant in his answer that he proposed to build it in a certain way which would prevent the evils apprehended were allegations of substantive facts, and not mere argumentative denials, and, not being denied, were admitted.

4. Injunction against threatened nuisance—A petition for an injunction against a threatened nuisance must set forth such a state of facts as leaves no room for doubt upon the question of nuisance; if there is any doubt upon the point it will be resolved in favor of the defendant.

One who owns property upon which it is necessary or desirable for the purposes of its use or enjoyment as a place of residence or business to build a privy, can not be restrained because it may render adjoining property less desirable.

J. C. Wickliffe for appellants.

Wm. Lindsay and John S. Kelley for appellee.

BRIDGEFORD v. KEENEHAN, &c.

Filed September 22, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, dismissing as to one appellee and affirming as to others.

1. Appeals—Jurisdiction—In a contest between an attaching creditor and the claimant of the attached property, or the claimant of a fund in court, or in the hands of a garnishee, the value of the property, or the amount of the fund in controversy, fixes the jurisdiction of this court upon an appeal from the judgment which determines that controversy.

2. Garnishment—Salary of city officer—The amount due by a city to one of its officers for services actually performed, or set apart to the officer by the city's authority for services performed or about to be performed, so that

the officer has the right to demand and receive it, is a proper subject of garnishment, and can be subjected to the satisfaction of debts due by the officer as any other chose in action, but wages or salary not due at the commencement of suit, but which may be earned by a city officer after the suit is commenced, can not be attached or subjected to the payment of the officer's debts.

3. Assignment of salary by city officer One to whom a city officer for a valuable consideration assigned his salary for a particular month before the expiration of that month had an equity superior to that of a creditor who attached the funds after the month had expired.

Elliott & Hemingray for appellant.

F. Hagan and Charles G. Hulsewede for Oswald.

Marshall & Lochre for White.

CONTINENTAL FIRE INSURANCE CO. v. ADAMS.

Filed September 22, 1886. Appeal from Madison Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Insurance—Forfeiture for nonpayment of premium—Where a policy of insurance in a foreign corporation provided that the company should not be liable for any loss if default should have been made in the payment of any installment of premium, and the note for the several installments was a promise to pay, "by mail if requested," there being no other designation as to the manner or place of payment, parol evidence was competent to show that the agent informed the insured when the contract was made that before he would be required to pay the various annual installments he would receive a notice from the company designating the person to whom the payment should be made, and at what place, and the property having been destroyed by fire while the insured was waiting for information as to where to pay a particular installment, he was not in "default," although it was past due; from separate requests to pay preceding installments by remittances to a particular place, a request to so remit the last payment could not be inferred. Nor did the company's mere act of posting notice through the mail operate as notice.

2. Bill of exceptions—A deposition read upon the trial of an ordinary action can not be considered on appeal where it is merely stated in the bill that the deposition of a certain witness was read, with directions to the clerk to "here insert," unless it is inserted by the clerk; it is not sufficient to copy it in another part of the record.

Thomas J. Scott and S. D. Parrish for appellant.

C. F. & A. R. Burnam for appellee.

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KENTUCKY COURT OF APPEALS.

LOUISVILLE & NASHVILLE R. R. CO. v. BRICE.

(Filed October 2, 1886.)

1. Willful neglect--Improperly loaded cars--Special verdict--Where a brakeman on a railroad train was killed while engaged in coupling cars, the mere fact that one of the cars was improperly loaded by reason of the fact that lumber projected over the end of it so as to interfere with the space necessary for coupling it, or even the fact that the conductor knew that the car was thus improperly loaded, does not of itself show willful neglect. To constitute willful neglect in such a case it must also appear that the conductor or other person in charge of the train knew, or by the use of ordinary care could have known, that the car was so improperly loaded as to imperil the life of the servant or employe. As the jury did not, by its special verdict in this case, find that the conductor knew, or should have known, that the car was so improperly loaded as to imperil the life of the brakeman, and the question was not submitted to the jury by the instructions under which the general verdict was found, a new trial should have been awarded the defendant.

2. Contributory neglect is not a defense to an action under the statute for willful neglect, if willful neglect is proved.

3. Where special findings are directed it should be as to every fact necessary to make out the cause of action or the defense, and if the special verdict is thus complete the appellate court will not look to the general verdict, or the instructions that may have been given to the jury.

4. A special verdict being asked, the court was bound to direct it, but it was in the court's discretion to also order the jury to find a general verdict.

Appeal from Christian Circuit Court.

Opinion of the court by Judge Holt.

The appellant, the Louisville & Nashville Railway Co., is

asking the reversal of a judgment against it in favor of the widow of J. J. Brice for \$5,000 for the killing of her husband by being run over, when engaged in coupling its cars and in its employ as a brakeman, by one of its trains, through the alleged willful neglect of its agents.

The action is brought under section 3, chapter 57 of the General Statutes, which authorizes it only when the killing is willful; and which was doubtless enacted to give the same right of action in the event of death to the widow, heir or personal representative as the deceased would have had if he had survived the injury.

The petition alleges in substance that the deceased was knocked down and run over by the train through the willful neglect of those in charge of it.

The answer is a denial, contributory neglect by the deceased being also pleaded.

An amended petition was filed, alleging that the deceased when killed was, by the direction of the conductor in charge of the train, coupling a car improperly loaded with lumber; that it projected beyond the end of the car so much as to interfere materially with the coupling of it, and to endanger the life of one undertaking to make the coupling; and that her husband was knocked down by the lumber and then run over and killed.

It clearly appears that the train was at the time of the accident being operated prudently; and the question presented is, what is the liability of the company under the statute when death results to one of its servants from handling a car not properly loaded? It does not clearly appear in this instance whether it was loaded by the appellant or the shipper; but probably by the latter.

The appellant asked the court to direct a special verdict only.

This the court refused to do. It ordered a special verdict, but a general one also, giving instructions to the jury. This was not error. It was bound to direct a special verdict when asked; but it had the right under the Code of Practice, and

it was in its discretion, to also order the jury to find a general one. (Empire Coal, &c., Co. v. McIntosh, 82 Ky., 554.)

The special verdict, aside from fixing the amount of damage, found but three facts, to wit: First, that the lumber did so far project beyond the end of the car as to materially interfere with the space necessary to enable the brakeman to make the coupling; second, that the injury to the deceased resulted from it; and, third, that he did not know of the improper loading, and did not have an equal opportunity with the others operating the train to know it.

Special findings must be treated like a general verdict. They will not be disturbed unless flagrantly against the evidence. They are not so in this instance. Therefore, without further discussion, we will accept them as true; and the first question to be determined is, did they authorize the judgment?

When special findings are directed it should be as to every fact necessary to make out the cause of action or the defense. Nothing is then left to be done save an application of the law to them by the court. If they are complete, the one way or the other, then they must control; and thus a general verdict, if also had, has no effect, as the special one renders it unnecessary.

It follows that if the special verdict be complete, then the appellate court will not look to the general verdict or the instructions that may have been given to the jury.

The special verdict in this instance, however, does not find facts showing willful neglect.

The mere fact that the car was improperly loaded, or that the lumber projected over the end of the car so as to interfere with the space necessary for coupling it, does not per se show willful neglect. Of necessity, timbers, for instance, must sometimes project, owing to their necessary length; and if a carrier could not carry them it could not discharge its duty to the public. If a car be improperly loaded, as by lumber projecting beyond the end of it; and even if this be known to the one in charge of the train, yet this fact is not so unusual, or

extremely dangerous, as to evidence a reckless disregard for the sanctity of human life, or constitute willful negligence. (Kentucky Central R. R. Co. v. Somers' Adm'r, MS. opinion, May 1, 1886.) It must also appear that the conductor, or the party in charge of the train, knew, or by the use of ordinary care should have known, that it was so improperly loaded as to imperil the life of the servant or employe. It may be to some extent improperly loaded, and yet not so as to apparently endanger the life of the brakeman, or place him in imminent peril; and if the conductor does not know, or by the use of ordinary care would not know, that this will be the effect of ordering the act to be done, he or his principal should not be held guilty of willful neglect.

As the special verdict did not authorize the judgment, we now turn to the consideration of the general one, and the instructions under which it was found.

The first one given for the appellee reads:

"The court instructs the jury that it was the duty of the railroad company, its agents and employes, either in loading its cars or in accepting loaded cars from others for transportation, to see that they were so loaded as not materially to obstruct or interfere with the space usually allowed and reasonably necessary for the entrance of the servants of said company in coupling said cars.

"That if they find from the evidence in this case that the car of said company doing the injury to deceased was so loaded as to unreasonably obstruct such space, and they further believe that said company, its agents or employes in charge of said train, had knowledge of such improper loading, or by the use of reasonable diligence might have ascertained such condition, and neglected to remedy same, and if they further believe that said J. J. Brice, while in the service of said company, attempting to couple such car, and using himself reasonable care and prudence for his own protection, nevertheless received the injury that caused his death by reason of such improper loading, then the jury should find for plaintiff such damages as she has sustained by reason of same."

This told the jury in effect that the matters recited in it constituted willful neglect, because the statute does not authorize a recovery in such a case for a less degree, and they were told that if they found the matters therein recited to be true they must find for the appellee. The objection to it is that it does not submit to them the very question as to which the special findings were faulty. The matter set out in the instruction did not, if true, necessarily constitute anything more than gross neglect; and the question was not submitted to the jury by a proper instruction, whether, if they found the cars were improperly loaded and so as materially to interfere with the space necessary for coupling, the conductor knew, or should have known by the exercise of ordinary care, that this was the case to such an extent as not simply to cause the employe to use greater care, but so much so as to place him in imminent danger or peril of life.

If the conductor knew this, or should have known it by the exercise of ordinary care, and yet ordered the brakeman to make the coupling, then it may well be said that he did so recklessly and in disregard of human life.

The rule as we have indicated will not only enable the carrier to properly discharge the duties he owes to the public, but it will also forbid a reckless disregard of human life in a business which at best is extremely hazardous.

As the case must go back for another trial, it is proper to say that the plaintiff must show willful neglect upon the part of the agents of the appellant. When this once appears, contributory neglect can not be relied on as a defense.

Judgment reversed, with directions to grant a new trial and for further proceedings consistent with this opinion.

John Feland and Wm. Lindsay for appellant.

John W. McPherson, Campbell & Campbell, R. W. Henry and Harry Ferguson for appellee.

JEFFRIES v. COMMONWEALTH.

(Filed September 18, 1886.)

1. Indictment—Murder—Evidence—Conspiracy—Where an indictment for murder charges that the killing was done by the defendant shooting the deceased with a pistol, thus inflicting wounds from which death resulted, it is not necessary that there should be a formal statement that the pistol was a deadly weapon, and at the time loaded with a leaden ball or other hard substance, since the shot could not have been fired and a fatal wound inflicted thereby if the pistol had not been a deadly weapon and loaded.

2. Defendants jointly indicted are competent witnesses for each other, although a conspiracy be charged in the indictment, unless there be such evidence as, in the opinion of the court, establishes with reasonable certainty the existence of the alleged conspiracy. The act of May 1, 1886, entitled "An act to permit defendants in penal and criminal prosecutions to testify," does not change the rule heretofore adopted by this court for determining the competency of such witnesses, and does not give the court trying the case arbitrary power to exclude them.

Appeal from McLean Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having been tried separately and convicted under a joint indictment against him and one Hugh B. Furguson for murder, prosecutes this appeal.

The particular circumstances of the offense are stated in the indictment as follows:

"The said John Jeffries and Hugh B. Furguson, on the — day of ———, 1885, in the said county of McLean, did unlawfully conspire together to kill and murder one Marion Hunter, and did, in carrying out said conspiracy, * * * willfully, * * * feloniously, and of their malice aforethought, kill * * * and murder said Marion Hunter, in said county, by the said John Jeffries shooting him, the said Hunter, with a pistol, and striking him with a large club, thus inflicting wounds of which the said Hunter did immediately thereafter die. The said Hugh B. Furguson was then and there present aiding, abetting, counseling, inciting, advising and assisting, etc."

The objection that the indictment fails to state that the pistol was a deadly weapon, and was at the time loaded with a

lead ball or other hard substance, can not be sustained, for the shot could not have been fired, nor a fatal wound inflicted thereby, if the pistol had not been a deadly weapon and loaded. A formal statement of these facts was not, therefore, indispensable.

After the conclusion of evidence on behalf of the Commonwealth, and appellant himself had testified, he, as shown by the record, offered to introduce as a witness in his behalf, Hugh B. Ferguson, who was in custody charged as a conspirator with him, but the lower court refused to permit him to testify as a witness. And whether this is a reversible error or not is the principal question in the case.

Section 3 of an act, entitled "An act to permit defendants in penal and criminal prosecutions to testify," approved May 1, 1886, before the trial of this case, is as follows:

"If two or more persons are jointly indicted they may testify for each other unless a conspiracy is charged in the indictment and proven to the satisfaction of the court."

This was intended as an amendment to section 234 of the Criminal Code, which is as follows: "If two or more persons be jointly indicted for the same offense, each shall be a competent witness for the others unless the indictment charge a conspiracy between them."

But this court, in the case of *Christian v. Commonwealth*, 13 Bush, 264, construing that section of the Code, said: "Although a conspiracy is charged in the indictment, defendants jointly indicted are competent witnesses for each other unless there is such evidence as, in the opinion of the court, establishes with reasonable certainty the existence of the alleged conspiracy."

This construction was subsequently approved in the cases of *Galloway v. Commonwealth*, 5 Ky. Law Rep., 213, and *Sparks v. Commonwealth*, MS. opinion, May, 1885.

We do not think it was intended by the act of May 1, 1886, to change the rule adopted by this court for determining the competency of such witnesses, nor to give to the court trying the case arbitrary power to exclude them. But under that act

defendants jointly indicted are competent witnesses for each other, although a conspiracy be charged in the indictment, unless, in the language of this court, there be such evidence as, in the opinion of the court, establishes with reasonable certainty the existence of the alleged conspiracy.

We are unable, after careful examination of the record in this case, to perceive any evidence showing the existence of the conspiracy charged.

There is only one witness who states he was present at or near the time Hunter is supposed to have been killed. He saw no blow struck or wound inflicted, but testifies that he saw the prostrate body of a person he thought was that of Hunter after nightfall, and saw a person standing over or near it who, he says, was appellant. He also testifies another person was present, but does not say it was Furguson, but, on the contrary, states he believes it was not him. No evidence was introduced showing any hostile feeling on the part of Furguson to the deceased, nor motive of any kind for taking his life, or conspiring with another to do it. Nor is there any evidence of pre-arrangement or plan between appellant and Furguson to commit the deed.

Three persons testified on the trial that at the time the witness for the Commonwealth fixes when he saw the body of Hunter in presence of appellant and another person unknown to him, both Furguson and appellant were together on a log-raft in the river some distance away.

In our opinion, as there was no evidence of the conspiracy charged in the indictment, appellant was clearly entitled to the evidence of Furguson, and the lower court erred in refusing to permit him to be introduced and examined as a witness in appellant's behalf.

There are some other errors complained of, but as they relate to the conduct of the trial and need not again occur, we deem it unnecessary to pass on them. But for the error indicated

the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

J. C. Johnson for appellant.

P. W. Hardin for appellee.

STAHL v. BROWN, &c.

(Filed October 9, 1886.)

1. Ferries—Injunction—Appeal—An order of a county court establishing a ferry is a judicial act subject to revision, and no power exists in any circuit court to enjoin and restrain by an independent action the exercise of a ferry privilege thus granted; if the order is erroneous the remedy is by appeal to the circuit court.

2. To authorize a county court to hear and determine an application to establish a ferry it is not necessary that summons should be served on any party; it is sufficient for notice of the intended application to be posted at the courthouse door on the first day of the next preceding term.

Appeal from Butler Circuit Court.

Opinion of the court by Judge Lewis.

Appellant instituted this action in the Butler Circuit Court to enjoin appellees from operating a ferry across Green river from a point on their land in Ohio county to a point on land relinquished to them for the purpose by the owners in the town of Rochester, Butler county, which was, on their application, established, and the privilege thereof granted to them by an order of the Ohio County Court made September 3, 1883, during a regular term.

It is stated in the petition, and may be assumed as true, that many years previous to that date a ferry was duly established by an order of the Butler County Court across the same river in the same counties, and only about 500 yards from the ferry of appellees, and that appellant and those under whom he claims have, in virtue of that order, operated, and yet continue to operate, and to have the ferry privilege so granted.

Upon final hearing the Butler Circuit Court sustained a demurrer to the petition and amended petition, and rendered judgment dismissing the action.

The decisive and only question we deem it at all necessary to consider on this appeal is whether the Butler Circuit Court has jurisdiction to set aside the order of the Ohio County Court establishing the ferry of appellees, which would be the practical effect of perpetually enjoining the exercise by them of the ferry privilege granted by that order.

By section 1, chapter 42, General Statutes, it is provided that the several county courts shall have jurisdiction to establish ferries and grant ferry privileges upon any river or stream in or adjoining their respective counties, and for regulating, making and controlling the same."

The statute does not require the issue and service of summons on any party, but under section 5 of that chapter it is sufficient to authorize a county court to hear and determine an application to establish a ferry for notice of the intended application to be posted at the courthouse door of the county on the first day of the next preceding term.

Section 2 is as follows: "An appeal from any order concerning a ferry, or ferry rates in favor of any one interested, shall lie to the circuit court of the county and thence to the Court of Appeals, both of which shall have jurisdiction of law and fact; but the Court of Appeals of only such facts as may be certified from the circuit, the appeal to be taken at the time of the making of the order or during the term, and prosecuted to the circuit court within three years from the making of the order, and to the Court of Appeals within one year from the making of the order of the circuit court."

As Green river adjoins the county of Ohio, and divides it from Butler at the places where the two ferries have been established, it is clear that the Ohio County Court had jurisdiction to hear the application of appellees and to establish the ferry, the use and operation of which appellant seeks in this action to enjoin. And as it appears the notice of their application was duly posted by appellees in the time and manner required by the statute, the order of the Ohio County Court must be considered as in full force until reversed and set aside

by appeal therefrom as provided in section 2 just quoted. For it is not so provided by the statute, nor do we think it was intended, for an order of a county court establishing a ferry to be set aside except on an appeal. Moreover, being a judicial act, it can not, according to the Civil Code, be vacated, nor the exercise of the privilege conferred by it be prevented or restrained by an order of injunction issued by another court in an independent and distinct action or proceeding.

In our opinion the Butler Circuit Court had no jurisdiction to set aside the order of the Ohio County Court, nor in any way to restrain or prevent the operation of the ferry established thereby, and this action was properly dismissed.

With the policy of the law this court has nothing to do, nor is it necessary to decide whether the order of the Ohio County Court was or not erroneous, for that question could be properly considered only on an appeal therefrom.

Judgment affirmed.

Hargis & Eastin, John L. Scott and B. L. D. Guffy for appellant.

Wm. Wand and E. D. Walker for appellees.

WALDEN v. CONN.

(Filed October 2, 1886.)

1. Landlord and tenant—Right of action for trespass—The tenant, and not the landlord, has the exclusive right of action for any injury to the possession of the rented premises, and this is true whether he retains the possession or not, since it is his exclusive right of possession that gives him the exclusive right of action. For any injury to his reversionary interest the landlord may have any appropriate action of redress, but not an action of trespass, as that action lies alone for an immediate and direct injury to the possession.

2. The mere fact that a landlord has lost his tenant by the wrongful ouster of him by a stranger is not of itself a legal ground of recovery against the stranger; to authorize the landlord to recover it must appear that he has sustained a loss of his rents which he would have received of the tenant, or that he has sustained damages in the destruction of the premises, or in the dilapidation of them injurious to the reversion, by reason of their being

vacant and unoccupied, and to recover such damages he may have an action in the nature of a special action on the case.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellant, James Walden, filed his petition in the Jefferson Common Pleas Court against the appellee, John D. Conn, in which he alleged in substance "that, being the owner and in the possession of one acre of land lying in Jefferson county, giving a particular description of the land, he, in March, 1884, rented the same to ——— Smith for the term of one year, and placed him in the possession thereof; that on or about the 1st day of April, 1884, the appellee forcibly, unlawfully and without plaintiff's consent, and without the consent of plaintiff's tenant, Smith, entered upon said land and built a fence thereon, and deprived plaintiff and his said tenant of the use and possession of said land. Plaintiff says he has been damaged by the said unlawful acts of defendant in the sum of \$500." He prayed judgment for that sum.

The appellee filed a demurrer to the petition, which was overruled by the court.

He then, by answer, fully denied the allegations of the petition.

The trial of the cause resulted in a verdict by the jury and judgment for the appellee, the court having peremptorily instructed the jury to find for the appellee.

If the appellant's petition sets out a cause of action, then the court's instruction was wrong. But if the petition sets out no cause of action, then the court's instruction was right.

While the question to be settled here has never heretofore been before this court, yet it is of easy solution.

It is a well-settled rule that when a contract of tenancy is consummated by the entry of the tenant, the exclusive right of possession is thereby instantly changed from the landlord to the tenant during his term; and for any injury to that possession the right of action is exclusively in him. This is so whether he retains the possession or not, because it is his exclusive right

of possession that gives him the exclusive right of action for any injury done to it, either by the landlord himself or a stranger, during the existence of that exclusive right.

During the continuance of the tenant's right of possession the landlord has no right of action for any injury done to it by a stranger or the tenant himself; his right is confined to the protection of his reversionary interest merely. For any injury to his reversionary interest, either by his tenant or a stranger, he may have any appropriate action of redress, but not an action of trespass, because that action lies alone for an immediate and direct injury to the possession. And the tenant having the exclusive right to the possession, he alone can resort to that kind of action.

The exclusive right of action being in the appellant's tenant for any wrong done to his possession, the averment of appellant, therefore, that he lost his tenant by the wrongful ouster of him by appellee is not of itself a legal ground of recovery, because nothing else being shown to the damage of appellant, the wrong was done to the tenant alone.

Also the averment that after the ouster appellee put up a fence on said land does not entitle the appellant to recover damages therefor, because it not being averred that the putting up of the fence was an injury to the reversion, the wrong was done alone to the tenant's possession.

As not inconsistent with the foregoing views, but as rather a continuation of them, if a stranger, either by threats or force, or by fraud or circumvention, drives the tenant away from the premises or induces him to leave them, knowing that he is a tenant, and intending thereby to wrong or injure the landlord, and whereby the landlord does in fact sustain a loss of his rents, which he would have received if the tenant had continued in possession; or whereby he sustains damages in the destruction of the premises, or in the dilapidation of them injurious to the reversion by reason of being vacant and unoccupied, then he may, by an action in the nature of a special action on the case, recover such damages as above in-

licated against the stranger. (3 Blackstone's Commentaries, 182; Taylor on Landlord and Tenant, 4th edition, page 118; Aldrige v. Stuyvesant, 1 Hall's New York Reports, 214.)

Also under such circumstances the fact that the tenant had no right to abandon the possession of the premises on account of the disturbance of the stranger, and that the injury complained of was caused by the wrongful act of the tenant by violating his contract in abandoning the premises, for which he is liable in damages, can not serve to protect the stranger, because he is an intentional wrongdoer against the landlord, and is liable to him for such damages as above indicated by reason of his wrongful acts. He can not be heard to say, as a defense of his wrongful acts, that the tenant was also guilty of a wrong to the landlord by abandoning the premises, whereby the injury complained of accrued. The fact that he wrongfully caused the tenant thus to act makes him responsible to the injured landlord to the extent above indicated upon the well-known principle that several wrongdoers are jointly or severally liable to the injured party.

As we have seen, the landlord's remedy against the stranger in such cases is by special action on the case in which the special damage that the party has sustained must be alleged and proved.

Here the appellant did not allege in his petition that he had sustained the loss of any amount of rent, or that he had been damaged by the destruction of his premises, or by the dilapidation of them in any way; the lower court, therefore, did right in giving the jury the peremptory instruction to find for the appellee, and the demurrer should have been sustained to the petition.

Wherefore, the judgment is affirmed.

Emmet Field for appellant.

Abbott & Rutledge for appellee.

ELLIS v. WREN.

(Filed September 23, 1886.)

1. Injunction—Continued trespasses—Constant or continuing trespasses by one on the property of another may be enjoined by the chancellor when he sees from the petition and proof that the party injured has no adequate remedy at law, and the fact that redress can alone be had by a multiplicity of actions at law for similar and continued trespasses upon the property presents strong grounds in favor of the jurisdiction of a court of equity.

2. Loose stone a part of realty—Stone gathered up on land by the owner or his tenants so as to enable the land to be cultivated is not thereby converted into chattels personal, but is still a part of the realty, and passes with it.

3. Powers of curator—The duty of a curator to whom the estate of a decedent has been intrusted pending the question of will or no will is confined alone to the preservation of the estate, and while he can sell such perishable goods as the county court may order to be sold, and no doubt may take possession of the real estate under an order of court, when its control and possession is with the executor, he has no power to sell the realty or anything that is a part thereof, although the will may invest the executors with full power to do so.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

This is an action in equity, instituted by the owner of a tract of land against the tenant in possession, asking that the latter be enjoined from hauling stone off the land and appropriating it to his own use. It is alleged in substance that the appellee (the tenant) had, from day to day, been hauling stone from the premises, and will continue to do so, causing great and irreparable injury to the estate, unless prevented by the chancellor; that said stone is of great value to his land for building and fencing purposes, there being no timber upon it, and of more value to the appellant than it could be sold for, etc.

On the final hearing the petition was dismissed, from which this appeal is prosecuted.

The question first raised is as to the power of the chancellor to grant relief in such a case as this. Constant or continuing trespasses by one on the property of another may be prevented by the chancellor where he sees from the petition and proof that the party injured has no adequate remedy at law, and the fact that redress can alone be had by a multiplicity of actions

at law for similar and continued trespasses upon the property presents strong grounds in favor of the jurisdiction of a court of equity. (Mussellman v. Marquis, 1 Bush, 463.)

The extent of the damages sustained by the appellant, and the ability of the appellee to respond to and satisfy any judgment that might be rendered against him, are questions not necessary to be determined. If the statements in the petition are true the injunction should have been made perpetual.

James Arnold at his death left a last will by which he invested his executors with full power to sell and convey any of his real estate. The question of will or no will seems to have been made by some of the devises, and the estate during the litigation placed in the hands of a curator. Stephens, the first curator, made a contract by which the appellee rented the land for the year 1882, with the privilege of removing therefrom as much loose stone as he might choose. And Stephens resigning, and L. A. Armstrong being appointed in his stead, the appellee made a similar contract with him for the year 1883, and during this last term the appellee undertook to remove the stone.

The will being established, the executor sold this land to the appellant, executing to him a deed therefor; and on the 6th of October, 1883, this petition was filed.

Some of the stone taken was imbedded in the soil; a part loose on the surface of the ground; but the greater portion was in rough walls or ridges running, some of them, a distance of one hundred yards, and others a much greater distance, from side to side of the hill, and the walls ten or fifteen yards apart. The hill side was full of stone and it was gathered up so as to enable the land to be cultivated.

The witnesses for the appellee say the stone was placed in wind rows and was of no value, while those for the appellant state that the stone was placed one on the other making a wall some two feet high and about the same width; that these walls kept the land from washing, and when the stone was removed the soil at many places was near the top of the wall.

It may be doubted whether the real estate devised would pass to the control of the curator unless by an express order of the court, because if not belonging to the devisees it passed to the heir; and if the power given the executor to make disposition of the realty invested him with the power to sell the stone on the land, such a right could not have vested in the curator because his duty is confined alone to the preservation of the estate. He can sell such perishable goods as the county court may order to be sold, and no doubt may take possession of the real estate under an order of court, when its control and possession is with the executor, until the question of will or no will has been determined. (Article 1, chapter 39, General Statutes, sections 21 and 22.)

There was no severance of this stone from the land, either by the original owner or the executor, with a view of selling it, and its condition or position on the hill side, when placed there by tenants prior to its occupancy by the appellee, did not convert the stone into chattels personal, but it was still a part of the realty, and, if undevised, would pass to the heir with the land, and when sold by the executor the title passed to the appellant. Besides, in the present case, it appears that the appellant purchased without notice of the claim of the appellee, except the fact of the latter's possession. We are satisfied, however, that the stone was a part and parcel of the realty, whether placed there by the owner or by subsequent tenants, and no power was vested in the curator to make sale of it. The fact that the stone may have been of little value, or that its removal so benefited the land as to fully compensate the owner, did not authorize the tenant to deprive the appellant of his property, or require the chancellor to withhold the relief.

If the property of appellant, its constant removal by the appellee, with the avowed purpose on his part to continue the assertion of his alleged right by an actual taking of the stone from the premises, entitled the appellant to an injunction.

We perceive no objection to the affidavit made to the original petition upon which the injunction was granted. The facts upon which the relief is sought are specifically and posi-

tively alleged, and the affidavit accompanying it that the appellant (plaintiff) believes the statements are true.

The judgment below is reversed, with directions to enjoin the appellee from taking the stone or any portion of it from the premises.

Simmons & Schmidt for appellant.

Phelps & Green for appellee.

TRABUE, &c. v. CONNERS.

(Filed September 28, 1886.)

Nonresidents—Jurisdiction to sell real estate—In an action to subject the real estate of a defendant constructively served the levy of an attachment is not necessary to give the court jurisdiction to sell the property. If a lien exists by contract, by statute, by the nature of the action, or in equity. Therefore, in an action upon a return of no property an attachment is not necessary to create a lien if the property sought to be subjected is specifically described in the petition, as a lien is thereby created.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bennett.

The appellee, John Connors, instituted an action in equity in the Bourbon Circuit Court against John Trabue and the appellants for the purpose of enforcing the satisfaction of a judgment rendered in his favor against John Trabue in the Bourbon Circuit Court for the sum of \$116.80 and \$8.70 costs, upon which judgment execution issued and was directed to the sheriff of Bourbon county, the county of John Trabue's residence, who returned it "no property found," etc.

The property sought to be subjected to the satisfaction of said judgment is specifically described as one-fifth interest in a tract of land owned by John Trabue jointly with his sisters, appellants owning the other interest therein, and subject to the dower interest of appellant, Lucy D. Trabue.

Summons was served on all of the appellants to answer said

action except John Trabue, which was as to him returned not found.

Afterwards he was proceeded against as a nonresident by constructive service, but no attachment was obtained. The lower court rendered judgment subjecting his one-fifth interest in said property to sale for the satisfaction of said judgment debt, etc.

From that judgment appellants have appealed to this court.

The attorney for the appellants contends that as there was no attachment sued out and levied upon the property of John Trabue, and as he was before the court alone by constructive service, the lower court had no jurisdiction to decree a sale of his property to satisfy said judgment.

A reference to the provisions of the Civil Code and the decisions thereunder will readily show the error into which the attorney has fallen.

Section 194 of the Civil Code provides that "the plaintiff may, at or after the commencement of an action, have an attachment against the property of the defendant * * * as a security for the satisfaction of such judgment as may be recovered," etc.

Section 418: "No lien on the property of a defendant constructively summoned shall be created otherwise than by attachment as is provided in chapter 3 of title 8, or by judgment," etc.

Section 419: "No personal judgment shall be rendered against a defendant constructively summoned, and who has not appeared in the action."

This court, in the case of Grigsby, &c. v. Barr, &c., 14 Bush, 330, in construing the two sections of the old Code which were similar to sections 418 and 419, supra, decided that when a statute provided a method by which the property of a nonresident might be reached, that method must be followed to the exclusion of any other not clearly pointed out.

Therefore, the Code having provided a method for subjecting the property of a nonresident defendant to the payment of any judgment that might be rendered against him, his property could not be subjected when there was no actual service of

summons and no appearance, or no attachment or lien existing upon the property.

This court in that case, and others incidentally involving the same question, simply holds that in the class of actions mentioned in section 192 of the Code, to obtain a judgment for money against a defendant constructively summoned, no judgment can be rendered subjecting his property to the satisfaction of such judgment unless the property so sought to be subjected has been attached in the action, as provided in the Code of Practice, so as to create a lien thereon, whereby the court can alone acquire jurisdiction of the subject-matter of the action, and in that way reach the nonresident defendant constructively summoned to answer in that class of actions.

The reason of the law as thus ruled in that class of actions is plain. In them, the defendant being merely constructively summoned, the court has no jurisdiction of him in personam; no personal judgment can be rendered against him. Therefore, in order that the court may reach him through his property, it must have jurisdiction of his property. It must be brought before the court, that the court may take hold of it, which can only be done by the assertion of a lien, on which the court may act. If the lien does not exist on the property in behalf of the plaintiff by contract, by statute or in equity, then, in order to give the court jurisdiction, the lien must be created by attachment, as provided by section 418 of the Code, which is the only way that the court in said class of actions can create a lien on his property so as to acquire jurisdiction to subject it to the satisfaction of any judgment rendered in the action.

We still adhere to the construction given to the provisions of the sections of the Code above quoted as applied to that class of actions. But the case at bar does not come within that class.

Here the action was brought under chapter 4, title 10 of the Civil Code of Practice, section 439 of which provides in substance that after an execution of fieri facias, directed, etc., has

been returned by the proper officer in substance no property found, the plaintiff in the execution may institute an equitable action for the discovery of any money, chose in action or other property, whether legal or equitable, which the defendant may own or have an interest in, and for subjecting the same to the satisfaction of the judgment.

Section 441 provides that the "plaintiff in the execution may have an attachment against the property of the defendant similar to the general attachments provided for in chapter 3, title 8, without either the affidavit or bond therein required."

Section 442 provides that "a lien shall be created on the property of the defendant by the levy of the attachment; or by the service of the summons, with the object of the action endorsed thereon," etc.

In the class of actions coming under this chapter of the Code a lien may be acquired on the defendant's property, of whatever kind, in manner as follows:

1st. If the property sought to be subjected is specifically described in the petition, then no attachment levy is necessary to give a lien on the property of the defendant. The lien in such a case is independent of the Code. It is an auxiliary action in the nature of a discovery in aid of a judgment which had been recovered in an action between the same parties, and shown not to be satisfied by a return of "nulla bona." And plaintiff, if the property discovered is specifically described in the action, has a lien upon it for the satisfaction of the judgment. Therefore, in such a case no attachment levy is necessary to create a lien on the property.

It is true in such a case the plaintiff under the Code may have an attachment also against the property of the defendant, but it is not necessary to create a lien.

If, however, the petition does not specifically describe the property, but seeks to discover unknown or unspecified property, then no lien is created by the action, and the plaintiff would have to obtain and levy an attachment on the property that might be discovered in order to create a lien upon it.

(Ward's Adm'r v. Robinson, &c., 1 Bush, 295; Murphy, &c. v. Cochran's Trustee, 80 Ky., 240.)

So the distinction between the first class of cases mentioned and this class is plain.

In the first class, if no lien exists upon the property by contract, statute or in equity, nor by the nature of the action, a lien can, therefore, be created on the property of the defendant constructively summoned only by the levy of an attachment. In the other class, where the property is specifically described in the petition, a lien is thereby created upon it, and the court, therefore, has jurisdiction of it, and may apply it to the payment of the nonresident's debt.

It would hardly be contended that in an action to enforce a lien upon land for the purchase money, or to foreclose a mortgage lien, or to enforce any statutory lien against the property of a nonresident defendant constructively summoned, a levy of an attachment upon the property would be necessary to give the court jurisdiction.

Every one would agree that as there was an enforceable lien upon the property, which would give the court jurisdiction of it in an action against the defendant constructively summoned, it would be wholly unnecessary to create another lien by the levy of an attachment in order to give the court jurisdiction when it already had it.

As the petition created a lien upon the property of the defendant which gave the court jurisdiction, we think it was not necessary to levy an attachment upon the property.

We think also the court below did right in sustaining the demurrer to appellee's answer.

We also think the court did not err in refusing to order the interest of John Trabue in said tract of land set apart before the sale of it.

Wherefore, the judgment of the lower court is affirmed.

E. M. Dickson for appellants.

Cunningham & Turney for appellee.

KAELIN v. COMMONWEALTH.

(Filed October 19, 1886.)

1. Indictment—Omission of word “feloniously”—It is absolutely necessary that an indictment for a common law felony should charge that the act was done “feloniously” or “with a felonious intent.” The use of no other words will supply the omission of such an allegation.

In this case an indictment for murder failing to allege that the killing was done “feloniously,” a demurrer thereto should have been sustained.

2. True test of good indictment—The true test of a good indictment for a felony at common law is that if the defendant should admit on the trial all of the material facts alleged as constituting the crime charged, he would not be permitted to plead or give in evidence any fact that would acquit him, such as self-defense.

3. Evidence—Exclamations—It was error to admit in evidence the exclamations made by bystanders soon after the offense was committed, to the effect that the defendant ought to be hung, although he was present and made no reply.

4. Constitutional law—Depositions in criminal cases—The legislature can not authorize the using of depositions against the accused in criminal and penal cases, but may authorize the accused to use depositions in his behalf; as the right of the accused, however, to use depositions in his behalf is surely statutory, he can not use them in any state of case not provided for by statute.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, Michael Kaelin, was indicted by the grand jury of Jefferson county for the murder of his wife, Caroline Kaelin.

The trial jury in the Jefferson Circuit Court found him guilty of said charge, and fixed his punishment at death.

His motion for a new trial having been overruled and sentence of death having been pronounced upon him, he appeals to this court.

He complains, first, that the lower court erred in overruling his demurrer to the indictment because of its insufficiency in law.

So much of the indictment as is material to the investigation of the question raised by the demurrer is as follows: “The grand jurors of Jefferson county * * * accuse Michael Kae-

lin of the crime of murder, committed in manner and form as follows, to wit: The said Michael Kaelin * * * unlawfully, willfully, cruelly, and of his malice aforethought, did kill, slay and murder his wife, Caroline Kaelin, by," etc.

The indictment fails to allege that the act of appellant in killing his wife was feloniously committed.

The contention of appellant is that the failure to allege that the act of killing was feloniously committed renders the indictment fatally defective.

If this position is well taken, then the lower court should have sustained the demurrer to the indictment, and, failing to do so, a new trial should have been granted, as the error runs through the entire proceedings thereafter had.

In order to keep an intelligent view of the question at issue before the mind it must be remembered that the appellant is not accused in the indictment of any crime created by statute, nor of any crime defined by statute, but he is accused of the common law crime of murder, which the statute of the State does not define, but simply fixes the punishment to be inflicted for committing the crime.

So in determining the question of the sufficiency or insufficiency of the indictment before us we must, of necessity, resort to the rules of the common law.

Mr. Bishop, in volume 1 of his work on Criminal Procedure, section 534, says: "The indictment should show plainly on its face whether the crime was treason, felony or misdemeanor. So that, while the pleadings were in Latin, the indictment for treason must contain the word *proditorie*; and for felony the word *felonice*. The omission indicated that the offense was no more than a misdemeanor; 'for,' says Starkie, 'it seems to be clear that no offense, as described in any indictment, can amount to more than a misdemeanor if it be not laid to have been committed either *proditorie* or *felonice*.' And these distinctions are continued, at least as to common law offenses, down to the present day, and in this country. The indictment

for treason alleges that the act was committed traitorously; for felony, that it was done feloniously; and where neither of these words are used the offense is only a misdemeanor."

Also the same author says, in volume 2, section 542: "Murder and manslaughter being equally felonies, the criminal act should in each be averred to have been done feloniously."

So also Wharton, in volume 1 of his work on Criminal Law, section 399, says: "The word feloniously is essential to all indictments for felony, whether at common law or statutory; and in several cases technical and appropriate words are frequently requisite in adding to the description of the offense. Thus in an indictment for murder it is essential to state, as a conclusion from the facts previously averred, that the said defendant, him, the said C. D., in manner and form aforesaid, feloniously did kill and murder, a term of art which in no case can be dispensed with. On the same principle it must also be alleged that the offense was committed of defendant's malice aforethought, words which can not be supplied by the aid of any other, and if any of these terms be omitted the indictment is defective."

So also Mr. Chitty, in his work on Criminal law, section 242, says: "There are certain terms which are usually inserted in the part of the indictment we are now examining which mark out the color of the offense with precision, and which are absolutely necessary to determine the judgment. Thus every indictment for treason must contain the word traitorously, and feloniously must be introduced in every indictment for felony; and these words are so essential that if the word feloniously be omitted in an indictment for stealing a horse it would only be a trespass. * * * As a conclusion from the facts averred it must be stated that so the defendant feloniously did kill, etc."

Also Sir William Blackstone, in 4 Commentaries, 306, says: "The offense itself must be set forth with clearness and certainty; and in some crimes particular words of art must be used, which are so appropriated by the laws to express the pre-

cise idea which it entertains of the offense that no other words, however synonymous they may seem, are capable of doing it. Thus in treason the facts must be laid to be done treasonably, etc. In all indictments for felonies the adverb feloniously must be used, * * * for these alone can express the intent—the very offense.”

Further quotations from the writers on criminal law are unnecessary. It is sufficient to say that they hold that it is absolutely necessary, in all indictments for felonies at common law, to use the word feloniously to indicate the crime itself.

The courts of England, says Mr. Bishop, have uniformly held that the word feloniously is indispensably necessary in all indictments for felony at common law.

The courts of last resort of nearly every State in this Union hold the same doctrine.

The Supreme Court of Missouri, in the case of *Jane v. The State*, 3 Mo., 61, holds that “there is no proposition more clear in law than in all indictments for felony, the indictment must charge the act to have been done feloniously or with a felonious intent.”

Also in the case of the *State v. Murdock*, 9 Mo., 739, the court says: “Every offense which is made a felony by statute must be charged to have been done feloniously, whether it was a felony by common law or not. The word feloniously is indispensably necessary in all indictments for felony, whether statutory or by common law.” Also to the same effect are the cases of the *State v. Williams*, 30 Mo., 364; *State v. Defenbacher*, 51 Mo., 26.

In the case of *Bowler v. The State*, 41 Mississippi Reports, 570, the court says: “It is settled that the word feloniously is indispensable in every indictment for a felony, and hence the motion to quash the indictment ought to have been sustained.”

In the case of *Mott v. The State*, 29 Arkansas Reports, 148, the court says: “The word feloniously must, of course, occur in the indictment, where the offense is a felony. * * * The indictment charges that appellant willfully and maliciously set fire to and burned the courthouse, but the word

feloniously is omitted. * * * The authorities, with scarcely an exception, agree that it is absolutely necessary in charging a felony to charge that the act was feloniously done, * * * that the substance of a good common law indictment should be preserved. If one matter of substance may be dispensed with, another may be; and where is the limit to the innovation? * * * This court has repeatedly held that in indictments for felonies the word feloniously is substantive in charging the offense—a word that has a fixed and well-defined legal meaning—understood by bench and bar.”

In the case of *Edwards v. The State*, 25 Arkansas Reports, 416, the court says: “The indictment charges that the defendant ‘purposely, and of deliberate and premeditated malice,’ made the assault and gave the mortal wound, and in the conclusion that he did ‘purposely and of deliberate and premeditated malice, kill and murder the deceased, etc.’”

“Premeditated and aforethought are synonymous; and premeditated malice and malice aforethought are, in sense and meaning, the same; and either form of expression may, with equal propriety, be used, and the indictment does, therefore, in fact charge the offense to have been committed with malice aforethought. But the omission of the word feloniously is not supplied by any other, and the authorities, with scarcely an exception, agree that it is absolutely necessary, in charging a felony, to allege that the act was feloniously done.”

In the case of *The People v. Olivera*, 7 Cal., 403, Chief Justice Murray said: “In my opinion it would be impossible to allege a felony without the word felonious, as it is necessary to show the intent with which the act was done. A crime may be the result of wickedness or malice, and at the same time may not be committed with a felonious intent.”

Many other cases might be quoted from other States to the same effect as the foregoing ones, but it is unnecessary to do so, as they only repeat the principle of the cases quoted.

However, before concluding our reference to authorities upon the subject, we will make a quotation from the case of the United States v. Staats, 8 Howard's Supreme Court Reports, 44, 45. The court says: "When words or terms of art are used in the description that have a technical meaning at common law these should be followed, being the only terms to express in apt and legal language the nature and character of the crime.

"In all cases of felonies at common law, and some also by statute, the felonious intent is deemed an essential ingredient in constituting the offense; and hence the indictment will be defective, even after verdict, unless the intent is averred. The rule has been adhered to with great strictness; and properly so, where this intent is a material element of the crime. * * * This view accounts for the necessity of the averment of a felonious intent in all indictments for a felony at common law, and also in many cases when made so by statute, because if it is used in the sense of the law to denote the actual crime itself, the felonious intent becomes an essential ingredient to constitute it. The term signifying the crime committed, and not the degree of punishment, the felonious intent is of the essence of the offense; as much so as the intent to maim or disfigure, in the case of mayhem, or to defraud, in the case of forgery, are essential ingredients in constituting these several offenses."

The foregoing cases and others similar to them arose upon indictments for acts done, which were declared by statute to be felonious, but did not declare that to constitute the crime the acts should be committed with a felonious intent.

These cases, therefore, bear with peculiar force upon the question at issue here, and fully demonstrate the absolute necessity of using the word feloniously in the indictment under consideration, the crime charged being a common law offense, as denoting the actual crime itself.

The true test of a good indictment for a felony at common law is that if the defendant should admit on the trial all of the material facts alleged in the indictment as constituting the

crime with which he was charged, he would not be permitted to plead or give in evidence any fact that would acquit him, such as self-defense. Now could the defendant admit all of the material facts alleged in this indictment as constituting the crime of murder, and then plead and prove that he acted in self-defense? If he could the indictment is clearly insufficient.

Suppose, then, that the experiment is made. He offers his proof of self-defense; but the Commonwealth's attorney says to him, you have admitted that you unlawfully killed this woman; he replies, no; I only admitted the material allegations of fact charged in the indictment as constituting the crime with which I am charged; and the word unlawfully is unnecessary and immaterial in an indictment where the crime exists at common law, and is manifestly illegal. Nor can it supply the place of the word feloniously, which indicates the crime itself. The word unlawfully may indicate that a trespass or some lower grade of offense was committed, but not that of a felony. (1 Chitty on Criminal Law, 241.) Besides, my defense is excusable homicide, which presupposes some fault or slight illegality of conduct on my part. Again, the Commonwealth objects to the evidence because he has admitted that he did the killing willfully and cruelly. He replies that admitting the word willfully to be a material allegation, yet the killing in self-defense is necessarily done willfully. It does not necessarily imply malice or that the killing was done with a felonious intent. I can admit that I did the killing willfully, and still show that I acted in self-defense. As to the word cruelly, I am not called upon to admit that because it is an unnecessary and immaterial charge. Besides, if I acted in self-defense it makes no difference how cruel a stroke was given. It is only strong evidence of malice, but is not conclusive of guilt. But, says the Commonwealth's attorney, you have admitted that you did the killing with malice aforethought. He replies: I admitted that when I did the killing I had malice toward the deceased, but malice does not denote the act itself.

The word feloniously is essential to fix the actual crime of felony. The felonious intent is the essential ingredient to constitute it; without such intent existing in fact or by construction of law no felony at common law can be committed. The word feloniously denotes the crime itself. The proof of malice, therefore, is admissible, not as constituting a felony, because a felony may exist without malice, but to increase the punishment of the felony.

In the nature of things the words felonious and malice are not equivalent or synonymous terms; not of the same legal import. (The State v. Gove and Wife, 3 N. H., 516.)

Therefore, as the words malice aforethought do not charge or denote a felony, but only increase the punishment, the felony is established. I can show that I did not in fact commit a felony. I have, it is true, admitted that at the time of killing I had malice toward the deceased, but that fact does not prevent me from showing that I acted in self-defense. The ground of self-defense does not preclude the idea of malice; the jury is not told that if they believe that the accused acted without malice, and in self-defense, they must acquit. The feelings of ill-will or of malice of the accused toward the deceased do not preclude him from relying on self-defense. He may have those feelings toward the deceased, yet he has the right to strike and kill in his necessary self-defense.

Those feelings are evidence against him to show that his plea of self-defense is a sham, but, even though established, can not deprive him of the benefit of his plea.

So we see that all of the material allegations alleged in the indictment as constituting the crime of murder might be admitted, yet the defendant would have the right, notwithstanding the admission, to plead self-defense.

On the other hand, if it were charged in the indictment, in addition to the other charges therein, that the killing was feloniously done, thereby indicating and fixing the crime itself, then that fact being admitted, no plea of self-defense could be heard.

For the foregoing reasons we think that the indictment is insufficient, and the demurrer to it should have been sustained.

The case of *Jane v. The Commonwealth*, 3 Met., 18, is relied on by the Commonwealth as sustaining the sufficiency of this indictment. In that case the indictment was for murder, but the word feloniously was omitted. All of the other material allegations, however, were made. There was no demurrer to the indictment. After the trial and conviction of the defendant, she moved to arrest the judgment, which motion was overruled by the trial court. She appealed from that ruling to this court. This court did not hold that the word feloniously was not a necessary averment in the indictment, but simply held that this court, under the Criminal Code of Practice then in force, could not reverse the judgment of the lower court in overruling the motion in arrest of the judgment of conviction because the substantial rights of the appellant on the merits were not prejudiced by overruling the motion. The 129th section of that Code provided that "no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by any defect which does not tend to the prejudice of the substantial rights of the defendant on the merits."

The provision *supra* of the old Code was left out of the present Code of Practice. Nor is there any similar provision contained therein. So the case of *Jane v. The Commonwealth* is not now an authority controlling the present question. Besides, in this case there was a demurrer entered to the indictment which, unlike the motion in arrest of judgment under the old Code, wherein the merits of the case entered into the consideration of the motion, goes directly to the legal sufficiency of the indictment.

The second ground of objection to the ruling of the court below relates to the following evidence of Mr. Baldwin, which the court permitted to go to the jury:

Question by the Commonwealth:

“Heard you any talk of what they (the persons assembled there) would do with the man that killed the woman?”

Answer. “Some said to hang him.”

Question. “What threats were made upon that occasion within the hearing of this man?”

Answer. “While I was there, several expressed themselves that he ought to be hung,” etc.

This evidence was clearly incompetent.

This court, in the case of *Bradshaw v. The Commonwealth*, 10 Bush, 577, held similar evidence to be incompetent.

Also in the case of *Werner v. The Commonwealth*, 4 Ky. Law Rep., 203, this court held similar evidence to be incompetent.

The exclamations or expressions of opinion of the bystanders did not come from any one acting in concert with the defendant. Nor did the exclamations come from any one concerned in the fact of killing. The exclamations came from mere bystanders, giving expression to the opinion that appellant ought to be hung. Such evidence was clearly hearsay, and should have been rejected by the court.

The fact that the appellant heard the exclamations, and did not deny the implied charge contained in them, that he was the guilty party, did not make the evidence competent. He was, if he had been in a condition to do so, under no obligation to deny the charge. No charge was made directly to him that he had killed the woman. The exclamations of an excited crowd as to what ought to be done with him he was not called upon to answer. His silence, therefore, was no implied admission of his guilt.

The instruction, No. 4, given by the court gives the law of insanity in accordance with the views of this court in the case of *Brown v. The Commonwealth*, 14 Bush, 398, and is fully as favorable as to the appellant as he is entitled to.

The court did not err in refusing to continue the case, and issue a commission to take depositions in Switzerland on behalf of appellant.

There is no inherent power in a common law court to issue commissions to take depositions to be read in behalf of litigants in a civil or criminal case. The right to use the depositions of witnesses in a common law court depends upon statutory regulations.

The legislature of the State has the right to allow defendants in criminal cases to take and use the depositions of witnesses, in their behalf, and to say how and under what circumstances they may be taken, etc. There is no constitutional inhibition against the State allowing defendants in criminal cases to take and use the depositions of witnesses in their behalf. The Constitution entitles the accused in criminal and penal cases to meet his accusers face to face, and to be confronted with the witnesses against him. The State, therefore, can not authorize the taking and using of depositions of witnesses against him; but he may use the depositions of witnesses in his behalf under any state of case that the legislature may allow. His right, however, in this regard is controlled by the legislature. The legislature of this State has provided that the defendant in a criminal case may take the depositions of his witnesses, to be used in his behalf, if they are about to leave the State without his procurement or consent, or are physically unable to attend for examination in court, or that their death is apprehended. As the right to take and use depositions in common law cases, and in criminal cases in behalf of the defendant, is a statutory right, and the legislature of the State having said in what state of case the defendant in a criminal case may take the depositions of witnesses to be used in his behalf, it follows that he can not take the depositions of witnesses in any state of case not provided for by the legislature.

We think that the court erred in not sustaining the demurrer to the indictment, and in permitting the witness, Baldwin, to testify as to what the people said who had assembled at the house of appellant just after the killing, and in not granting appellant a new trial.

November, 1886—3

The case is reversed, with directions for further proceedings consistent with this opinion.

Alpheus Baker, Kohn & Barker, Whittaker & Parsons and W. G. Baird for appellant.

P. W. Hardin for appellee.

WILLETT'S ADM'R v. RUTTER'S ADM'R.

(Filed October 5, 1886.)

1. Construction of devise—Vested and contingent interests—When a testator by his will directs the payment of a legacy at some future time after the decease of the testator, or upon the happening of a contingent event, and there is no provision in the will for vesting the legacy immediately, then the future time fixed, or the happening of the contingency, is of the essence of the gift, and the legatee takes only a contingent interest, unless the other provisions of the will show a contrary intention, as by directing the application of the interest or rents in the interim to the use of the legatee.

In this case the testator provided that "if at my death there shall be any surplus stock or personal property, or any cash or cash notes on hands, it is my will and desire that the stock and personal property may be sold, the money collected and loaned out during the life of my wife, and at her death I desire that it may be divided between my said daughter and granddaughter." Held—That the daughter and granddaughter did not take a vested interest, the other provisions of the will showing that by this provision the testator intended what its language taken alone imports.

2. Where a testator provided that "money" be loaned out during the life of his wife, and at her death that "it" be divided between his children, the pronoun "it" is treated as referring to both principal and interest, and the devisees taking only a contingent interest in the principal took the same kind of an estate in the interest, no directions having been given for the use of the interest for the benefit of the legatees, and their maintenance having been otherwise provided for.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Bennett.

The controversy on this appeal from the Harrison Chancery Court involves the construction of the 6th clause of Alex. Rutter's will, which is as follows, to wit: "If at my death there shall be any surplus stock or personal property or any cash or cash notes on hands, it is my will and desire that the stock

and personal property may be sold, the money collected and loaned out during the life of my wife, and at her death I desire that it may be divided between my said daughter and granddaughter."

Viewing this clause in the light of its own language, the question is, first, did the legatees mentioned therein take a vested interest in the fund therein mentioned at the death of the testator, or did they take only a contingent interest therein dependent on the death of the testator's wife? or, second, granting that the legatees took only a contingent interest in the principal of the sum directed to be divided between them at the death of the wife, did they take a vested interest in the interest arising from the principal?

First, as to the principal: In Jarmon on Wills, volume 1, side page 760, it is said that as to "the rules which regulate the vesting of personal legacies, the payment of which is postponed to a period subsequent to the decease of the testator, a leading distinction is that if futurity is annexed to the substance of the gift the vesting is suspended; but if it appears to relate to the time of payment the legacy vests instantaneously." Thus, if the legacy is in the first instance given or devised to the legatee, as I give or devise to A such property, etc., and is then directed to be paid at some definite period of time after the decease of the testator, as when the legatee arrives at twenty-one years of age, then the legacy vests immediately.

The same rule obtains when the legacy is given to two or more persons with words directing a division or distribution of the legacy among them at some future time, as when one shall attain the age of twenty-one years.

In other words, the testator must, by the provisions of the will, give an immediate interest in the estate to the legatee; and the superadded words fixing the time of payment or distribution to some future time must relate to the time of passing the possession of the property to the legatee and not to the gift. (Side page 761, supra.)

On the other hand, "if the payment or distribution is deferred, not merely until the lapse of a definite interval of time which will certainly arrive, but until an event which may or may not happen, the effect, it should seem, is to render the legacy itself contingent."

Also "where the only gift is in the direction to pay or distribute at a future age, the case is not to be ranked with those in which the payment or distribution only is deferred, but is one in which time is of the essence of the gift." (Page 762, *supra*.)

Also in the case of *Roberts' Ex'ors v. Brinker*, 4 Dana, 570, this court says: "It is an established rule of construction respecting legacies that when there is no other legatory expression or intention than that implied in a direction to pay or distribute at a future time or on a contingent event, the bequest, nothing else appearing, should be considered as contingent. But as *prima facie* it may be presumed that a testator did not intend that any interest bequeathed in his will should lie dormant or undisposed of after his death or should ever lapse, therefore, a slight circumstance may be sufficient for showing that a legacy is vested and not contingent."

Also in the case of *Combs' Devisees v. Branch*, 4 Dana, 548, it is said: "Where there is nothing legatory except what may be implied in the direction to distribute or pay to the legatee, the legacy shall be deemed contingent until the time for distribution or payment—nothing else appearing for determining the testator's intention—for in such a case the time of distribution or payment is considered as annexed as an implied condition to the gift itself."

Also to the same effect is the case of *Briscoe's Devisees v. Wickliffe*, 6 Dana, 158.

Thus we see that when the gift is created simply by directing the payment or distribution of the legacy at some future period of time after the decease of the testator, or upon the happening of a contingent event, and there is no provision in the will for vesting the legacy immediately, then the future

time fixed, or the happening of the contingency, is of the essence of the gift.

It is true that this rule does not prevail when the provisions of the will show a contrary intention of the testator, such as directing the application of the interest accruing on the fund in the interim to the use of the legatee, or application of the rents or use of the property in the interim for the benefit of the legatee. These circumstances will show almost conclusively that the testator intended the body of the property to vest in the legatee immediately also.

So, also, if it appears that any interest devised in the will would fail for the want of a legatee or be undisposed of after his death, in consequence of the legacy not vesting in the legatee until the future period of time or the happening of the event fixed for the enjoyment of the legacy by the legatee, then the presumption would be strong that the testator, not wishing such a state of affairs to exist, intended the legacy to vest in the legatee immediately.

But here the other provisions of the will show that the testator intended this provision of the will to mean just what its language taken alone legally imports.

For he provides that this fund should be kept out at interest, and by implication that his executors should be the trustees for that purpose. Also that the legatees should only have a life estate in the property devised to them, and at their death the property was to go to their living children and the descendants of those that had died, if any. And in case either one of the legatees should die without leaving living children or descendants of those that had died, then the estate devised to her should go to the other legatee for life, and at her death to her living children and the descendants of such as might be dead, if any. And in case both of said legatees should die without living children or living descendants of such as might be dead, then said estate to go to his nearest blood relations. So we see that the testator provided in the will against the lapse of

any of the estate bequeathed and against the possibility of any of it being undisposed of.

It is also manifest from the other provisions of the will that the testator meant the clause of the will in question to have the effect that its language legally imports, for the other clauses which gives legacies to these legatees are different in language; they start out by the expressions, "I give and bequeath to, etc." These gifts also related to land and slaves; the devise of them to the legatees was direct, and being of different property from that mentioned in the sixth clause, and not so easily diverted from the testator's intentions as expressed in the will, and it being the clear intention of the testator as expressed repeatedly in the will that the estate devised should be confined in its uses to his blood relations, it is manifest that he meant to use the language of the sixth clause of the will as giving the legatees a contingent interest in the fund therein mentioned upon the death of his wife. Also the will was evidently drawn by a draftsman experienced in the technical terms of conveyancing, and the language employed in the sixth clause, which discriminated the character of gift therein mentioned from that given by the other clauses, was evidently used intentionally and advisedly.

For the foregoing reasons we conclude that the testator intended, as the language of the sixth clause indicates, to give to the legatees a contingent interest in the fund therein mentioned.

As to the second proposition, to wit: That granting that the principal of the sum given was intended to be given to the legatees contingently, they were to take a vested interest in the interest arising from said fund.

It is to be observed that the "money was to be loaned out during the life of the wife, and at her death it was to be divided." It was doubtless known to the draftsman of the will that interest due becomes a part of the principal, and the pronoun "it" was, therefore, intended to refer to both principal and interest. Besides, no directions having been given

for the use of the interest for the benefit of the legatees, and their maintenance having been otherwise provided for by the testator, no presumption arises that he intended the interest to be used for their benefit, but the principal and interest should go together, and be divided between them at the death of the wife.

The appellant's intestate having died unmarried and childless before the wife of the testator, it follows, according to the foregoing views, that she took nothing under the sixth clause of the will; and that the chancellor did right in rejecting appellant's claim for one-half of the rents arising from the land which was purchased under a judgment of the Harrison Circuit Court with the funds devised by the sixth clause of the will.

Also the chancellor did right in allowing the offset, in the way of rents, for the said land for the time she used and controlled it against the claim of \$284, together with interest thereon, balance due said intestate by said testator as her guardian.

The case of *Hocker, &c. v. Gentry, &c.*, 3 Met., 453, and relied on by appellant as controlling this case, does not govern it.

In that case, as in this, the fund devised was to be divided among a class of legatees at a future period of time. This court held in that case that the legatees took a vested interest in the fund devised to them, but the decision rested upon the ground that the will contained apt words of conveyance as, "I devise to the children of my deceased son, etc." The court, therefore, held that the legatees took a vested interest in the property devised. Here no such words occur in the sixth clause of the will; it must, therefore, be construed according to the rules above mentioned.

The judgment of the lower court is affirmed.

J. Q. Ward for appellant.

A. Duvall, L. Desha and T. T. Forman for appellee.

FEICHEIMER BROS. & CO. v. CITY OF LOUISVILLE.

(Filed October 2, 1886.)

1. Constitutional law—Discrimination against nonresidents—An ordinance of the city of Louisville, which provides that any person who conducts his principal place of business without the city, and shall offer to sell goods by sample within the city, shall be required to obtain an annual license therefor, and shall be required to pay for such license a sum not required to be paid by persons having their principal place of business within the city, discriminates against the residents of other States, and is, therefore, in violation of the Federal Constitution. The fact that the ordinance discriminates against residents of this State outside of the city as well as against residents of other States does not make it valid.

2. Recovery of money paid under mistake of law—One who, under a mistaken belief as to the validity of an ordinance, has paid to a city a sum of money required by the ordinance to be paid for a license to do business, is entitled to recover the money back, the ordinance being invalid.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

The general council of the city of Louisville passed an ordinance, approved February 8, 1877, entitled "An ordinance to license sample dealers." Section 1 is as follows:

"That any person whose principal place of business is not in this city, or who conducts his principal place of business without this city, and that sells or offers to sell any goods, wares or merchandise by sample or representation in this city to any person other than persons living in or doing a license business in this city, must first obtain an annual license therefor, and shall pay for such license \$200.

"2d. Any person violating this ordinance shall be fined not less than \$20 nor more than \$50 for each offense."

The appellants, who are wholesale merchants, having their principal place of business in the State of Ohio (city of Cincinnati) were selling goods by sample through their commercial agent in the city of Louisville, and being threatened with the penalties for violating the city ordinance with reference to such sales, paid to the city the license imposed by the ordinance, and are now seeking to recover back the money

from the city on the ground that the ordinance is invalid, because it discriminates against the nonresidents of the State, as well as those residing within the State, engaged in the sale of merchandise, in favor of merchants residing within the city of Louisville. It is alleged that the money was paid under a mistaken belief as to the validity of the ordinance, and because they had no practical mode, at the time of the demand, for resisting its payment.

The city charter of Louisville requires that every merchant doing business within the city shall first obtain a license, and the sum to be paid in the way of license is regulated by the amount of business done; the lowest class being fixed at \$5, and the highest at \$400.

The plaintiffs (appellants) allege that their annual sales amount to not exceeding \$20,000 within the city, and that their license regulated by the ordinance with reference to merchants would be only \$25; whereas they are required to pay \$200.

Section 2 of article 4 of the Federal Constitution provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." And if, as contended by appellants, the ordinance in question is in violation of this provision of the Constitution, it results that the city has obtained from the appellants a sum of money to which it was not entitled, under a mistaken view as to the validity of the ordinance, and are entitled to recover.

While the doctrine laid down by Mr. Cooley that "the methods in which business shall be taxed are within the legislative discretion," it must also be understood that when such legislation is forbidden by the State or Federal Constitution it is invalid, and will not be enforced. The ordinance under which this payment was enacted applies to the resident of the State as well as the nonresident, and no one having his place of business outside of the city limits is allowed to sell by sample unless he pays the license imposed; and the fact that its provisions apply to the resident of the State as well as the non-

resident does not add to the validity of the act or give strength to the argument in support of it. The merchant residing in the city of Louisville, his place of business, can sell \$20,000 worth of goods in each year, for which he pays a license of \$20 or \$25, while the merchant or manufacturer residing in the county of Jefferson, or in the city of Cincinnati, is required to pay \$200 for selling by sample, although he may not sell more than one-tenth of the aggregate amount sold by the merchant in the city. The one merchant living in the city can sell by sample without license, and the other is compelled to pay for that privilege, and this discrimination applies to the resident as well as the nonresident.

The statute of Maryland, the validity of which was determined by the Supreme Court in the case of *Ward v. Maryland*, 12 Wallace, 418, determines the question raised here. There the facts were almost identical to those found in this case.

The license thus imposed on the merchant was regulated by the amount of business done, the highest tax being \$150. The nonresident merchant, or the merchant who sold by sample from another State (New Jersey), was required to pay \$300. The statute was held void, as it must necessarily be in this case.

In *The State v. Furbush*, 72 Me., 493 (decided by the Supreme Court of Maine), where an act was passed allowing goods manufactured in that State to be peddled without a license, and at the same time imposed a license for peddling similar goods manufactured out of the State, it was held that the act was in violation of the Federal Constitution. The same principle was announced in the case of *The State v. North & Scott*, 27 Missouri, 464, and in the case of *Daniel v. Richmond*, 78 Ky., 542.

If the city of Louisville, through its council, can impose taxes or exact a license so as to discriminate against all those who live out of the city and are engaged in like business, and

all other cities and towns within the State by way of retaliation, or for their own protection should impose like restrictions, it would be a practical destruction of all trade and commerce between this and any other State, and in fact between towns and cities in our own State. The merchant in Louisville can sell anywhere within the State, while the merchant outside of that city is not allowed to sell within the city limits. That the resident merchant pays taxes for the improvement of streets, the support of the public schools, and for the maintenance of the poor in the city, is no reason why this discrimination should be made. He is supposed to, and in fact does, receive benefits from the duties thus imposed that do not pertain to the nonresident, and whether so or not, that there is a palpable discrimination in this case is evident, and, therefore, the ordinance is in violation of the Federal Constitution. Whether the amount of money paid in this case is called a tax or license is immaterial; if either, it is invalid.

One of the objects of this provision of the Constitution was to prevent such discriminations by State legislation, and to protect and require uniform regulations with reference to trade and commerce between the several States.

The property or merchandise brought into this State for sale, or for any other lawful purpose, is entitled to all the protection the property owned by the resident has, and can not be required to assume greater burdens, whether in the way of license or taxation. The power to collect taxes on property, and to require a license on business, certainly belongs to the State, but this power must be so exercised as not to violate the fundamental law.

The effect of this ordinance is to drive all competition in trade from the city, and at the same time to permit the resident merchant to compete with all those engaged in business outside of the city limits. The doctrine announced, and now well settled, is "that goods, merchandise or other property brought into this State for sale can not be subjected to a higher tax or required to pay more for the privilege of selling.

than is imposed upon like goods or property—sold or offered to be sold—by residents of the State, the citizens of each State being entitled to all privileges and immunities of citizens in the several States.” The demurrer to the petition should have been overruled, and the appellant required to pay no more than it exacted from the merchants doing business in the city. This, it is alleged in the petition, he is willing to pay. Judgment reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion. (Walling v. Michigan, 116 U. S., 446.)

Chas. H. Gibson and Brown and Davie for appellants.

T. L. Burnett for appellee.

McCRACKEN COUNTY v. MERCANTILE TRUST CO.

(Filed October 16, 1886.)

1. Constitutional law—Right to plead limitation a vested right—When a cause of action is already barred by a statute of limitation the right to plead the statute is a vested right that can not be disturbed by subsequent legislation extending the time within which such actions may be brought.

2. Lien—Limitation—There is no statute of limitation as to liens, and if the claim to secure which the lien existed becomes barred the lien dies with it.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Holt.

The appellee, Marcella Laurie, was the owner, in 1873 and 1874, of a lot of land in McCracken county, which was assessed for taxation for those years for county purposes. The taxes remaining unpaid, the county collector, on December 17, 1874, sold the property to satisfy the amount owing for 1873; and on March 8, 1875, he again sold it for the taxes of 1874, the county in each instance, becoming the purchaser at the price of the taxes due upon it. Subsequently the Mercantile Trust Co. purchased the property.

On the 18th day of February, 1884, the legislature passed an act, the first section of which provides “that in all cases where real estate in McCracken county has been heretofore sold

by any collecting officer, or by other proceedings on behalf of said county for taxes due McCracken county, and bought by said county, it shall be lawful for said county, in its name, to file a petition in equity in the McCracken Court of Common Pleas, or other court of said county that may have civil equitable jurisdiction, against the owner, his heirs, or assigns, or devisees (as the case may be) of such real estate so sold as aforesaid, and bought by said county, describing the same with reasonable certainty, and also make defendant to the suit the owner, by purchase, if any, of such real estate and all mortgages or other encumbrancers, if any, of said land at the time suit was brought; and it shall be lawful for the county, the plaintiff in the suit, to subject such real estate in rem by the judgment of the court, and have a sale of such land under the same for the satisfaction of the amount of the price at which the county may have bid off such real estate at the collecting officer's sale of the same, or under other proceedings, with interest thereon at 6 per cent. per annum from the date of such sale until paid, and all costs of the action, including an attorney's fee of \$5, which shall be taxed as costs in favor of the plaintiff in the action in every case of recovery. And the county of McCracken is hereby declared to have a continuing and subsisting lien upon the real estate for the satisfaction of the amount of such taxes, interest and cost, aforesaid; and in the enforcement of the same, as aforesaid, no plea of the statute of limitation shall be interposed thereto other than the statute of fifteen years."

This action was brought by the county on August 5, 1884, to enforce its alleged lien for the sums at which it had bid in the property at the collector's sales, and to sell the same therefor.

More than five years had elapsed from the time the taxes were due, and also from the date of the collector's sales, before the purchase by the trust company; also before the passage of the act supra and before the bringing of this action.

The general law in force during that time provides:

"An action upon a liability created by statute, when no other time is fixed by the statute creating the liability, * * * shall be commenced within five years next after the cause of action accrued." (General Statutes, chapter 71, article 3, section 2.)

The defense of five years' limitation was interposed; the county demurred to it, relying upon the provision in the act of February, 1884, "and in the enforcement of the same, as aforesaid, no plea of the statute of limitation shall be interposed thereto other than the statute of fifteen years;" and its validity is now in question, the demurrer having been overruled.

It is clear that at the time of its passage the collection of the claim could not have been enforced. The defense to it was perfect. Had the legislature the power to divest this right? The question is *res nova* in this State.

Beyond doubt it may, before a claim is barred under the existing law, extend the time for its enforcement.

Upon the other hand, it may shorten it, provided it affords a reasonable time for its assertion.

It is urged, however, that time does not pay a debt; that the statute of limitation does not extinguish it, but merely relates to and withholds the remedy; and that as it is founded upon public policy, it is a matter bounded only by legislative discretion.

It is agreed upon all hands that in cases where, by the lapse of time, a title to property is vested, that it can not be divested by the legislature.

This is not disputed by any authority known to us; but some of them have attempted to draw a distinction between such a case and the enforcement of a mere debt or obligation. Upon the other hand, it has been denied that there is any foundation whatever for a difference. It is true that in the one case the party in possession has been asserting a claim to the property; but in the case of a mere debt the effect of its enforcement, when barred by time, would be to divest the owner of his property; and it seems to us that there is little difference in fact

and none in principle, whether the case relates to a claim to property in specie or damage for the breach of a contract or the enforcement of a debt merely.

A retrospective law which divests a vested right is beyond the constitutional limit of legislative power. If the legal right be gone the contract is discharged until it is in some legal way re-affirmed; and when the constitutional test is applied by the courts, as is their duty, it must be held that the legislature can not make a new contract for the parties.

Some confusion has arisen by the failure of writers and jurists in speaking of the obligation of a contract to distinguish between the legal right and the moral one.

Blackstone says "that wherever there is a legal right there is a legal remedy;" and "that the want of right and the want of remedy are the same thing."

Undoubtedly the legal remedy may be modified or changed without impairing the legal right, if the remedy in the new form be not impaired; but it seems to us that it is illogical to hold that the remedy may be destroyed and the legal right remain.

A legal right is one which is protected by law, and the means of protection is the remedy; and it is not to be supposed that one can have his legal right seized by another and yet be remediless.

The existence of one implies the existence of the other; and one can not exist without the other.

It must be kept in mind that we are now speaking of the legal right and not the moral obligation.

Both may exist, the one being based upon civil and the other upon natural law. The latter is not, therefore, affected by a statute of limitation, which bars the remedy and destroys the legal right.

We are aware that it was held in the earlier cases of *Graves v. Graves*, 2 Bibb, 207, and *Chiles v. Calk*, 4 Bibb, 554, that such a statute bars the remedy and not the right; but the later cases hold that it takes away the legal right; and they conform

to sound reason, which says that when the law no longer protects a right or affords the means of enforcement, it necessarily dies. (Stanley v. Earl, 5 Littell, 281.)

In Carr's Ex'or v. Robinson, &c., 8 Bush, 269, it is said:

"If a promise was made after the running of the statute, this promise created a new obligation, and constituted a new cause of action upon which suit should have been instituted.

* * * After the lapse of fifteen years from the maturity of the note without suit the obligation or note is regarded as dead, and it can not be revived by any promise to pay, so as to authorize a suit on the original debt or obligation; but if the promise is made during the fifteen years from the maturity of the note or obligation it lengthens the vitality of the paper, and the statute commences to run from the date of the promise."

To the same effect is the case of Trousdale's Adm'r v. Anderson, 9 Bush, 277.

In Shelby County v. Searce, 2 Duvall, 576, this language was used:

"The legal obligation of a contract is neither more nor less than a right to employ legal remedy to enforce or uphold the rights and duties of the parties to the contract. Wherever there is a legal remedy there is a legal obligation; and wherever there is no legal remedy, there is no legal obligation."

We conclude, therefore, that both upon sound reasoning and former opinions of this court that the statute of limitation of this State not only bars the remedy, but takes away the legal right.

It is, therefore, unnecessary to discuss the question whether the legislature would have the power, if our statute of limitation merely barred the remedy, leaving the legal right in existence, to take from a person what has become a perfect defense to a claim or debt; or to notice the cases upon the one side, which hold that it has the right to do so in such a case; or those upon the other adopting the contrary view.

Wood on Limitation, section 12, says: "If, before the statute bar has become complete, the statutory period is changed,

and no mention is made of existing claims, it is generally held that the old law is not modified by the new, so as to give to both statutes a proportional effect; but that the time past is effaced, and the new law governs—that is, the period divided by the new law must run upon all existing claims in order to constitute a bar. In other words, the statute in force at the time the action is brought controls unless the time limited by the old statute for commencing an action has elapsed while the old statute was in force, and before the suit is brought, in which case the suit is barred, and no subsequent statute can renew the right or take away the bar.”

In Cooley's Constitutional Limitations, page 455, it is said:

“Regarding the circumstances under which a man may be said to have a vested right to a defense against a demand made by another, it is somewhat difficult to lay down a comprehensive rule which the authorities will justify. It is certain that he who has satisfied a demand can not have it revived against him, and he who has become released from a demand by the operation of the statute of limitation is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties—a thing quite beyond the power of legislation.”

The legal demand is discharged, leaving nothing but a moral obligation, binding only in foro conscientiae; and hence a revival of it by legislative enactment involves not only the creation of a new obligation, but the violation of a vested right.

Puffendorf says “a law can be repealed by the law giver; but the rights which have been acquired under it while it was in force do not thereby cease.” This was the rule of the civil law, and has been strictly adhered to in England, where there is no express restriction upon the legislative power.

In the States of Massachusetts, Michigan, Arkansas, Mississippi, Pennsylvania, Iowa, Indiana, Tennessee, New Hampshire, Wisconsin, Alabama, and perhaps others, it has been held that the legislature can not extend the time, if the cause of action be already barred.

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It is true that in some of these States the rule is based upon a clause in the State Constitution forbidding retrospective legislation.

In others the statute of limitation is held to extinguish the obligation; while in others the rule rests upon the broad ground that the defense having become perfect, it is a vested right which can not be taken away by legislative action.

In the case of *Girdner, &c. v. Stephens*, 1 Heiskell, 280, it was said: "We hold, both on authority and principle, when a cause of action is barred by a statute of limitation in force at the time the right to sue arose, and until the time of limitation expired, that the right to rely upon the statute as a defense is a vested right that can not be disturbed by subsequent legislation."

In the cases of *Right v. Martin*, 2 Ind., 123; *Baldro v. Tomlie*, 1 Oregon, 176, and *Brown v. Prather*, 28 Wis., 21, it is held that a repealing act can not renew a liability that has already been extinguished; and in *McKinney v. Springer*, 8 Blackford, 506, and *Rockport v. Walden, Ex'or*, 54 N. H., 167, that no subsequent statute can renew a right to sue which is already barred. Beyond question the legislature can not take the property of one citizen and give it to another. Neither can it do so indirectly by depriving one of the right to set up a defense perfect in him at the time.

It is a part of our fundamental law that no one can be deprived of his property without due process of law. This not only requires that a party shall be brought into court, but that he shall have the opportunity when there to assert any defense to which he has become entitled, and which will protect his property.

We conclude that to hold the clause in question of the statute valid as to a claim, without legal existence at the time of its passage, would not only divest a party of a defense at the time perfect, but would make a new contract for the parties, and thus pass the constitutional limit of legislative action.

By the sixth section of an act of the legislature, approved February 12 (1782, Acts 1871-2, page 889), it was declared that the county should have a perpetual lien on the property assessed for the tax until payment; and it is claimed, therefore, that there is no limitation as to its collection.

The fourth section of the act gave the county the right, in case it had purchased the property for the taxes, to enforce a lien against it therefor, by a suit in equity, and sell the interest of the taxpayer therein. This lien was created when the assessment was made, and was but an incident of the tax claim or obligation. There is no statute of limitation as to liens. If the claim becomes barred the lien dies with it. (Tate v. Hawkins, &c., 81 Ky., 577.) If the claim could be made an incident of the lien, then "the statute of repose" would be defeated. As the claim no longer legally existed, the lien had nothing to support its existence.

Judgment affirmed.

L. D. Husbands for appellant.

W. G. Bullitt for appellee.

STILLWELL, &c. v. LEAVY, &c.

(Filed October 21, 1886.)

1. Construction of devise—Limitation—Under a devise of real estate by a testator to his wife "for the support of all the family, to be divided between their children at her discretion," the children, who were meant by the word "family," had an immediate right to the use and profits of the land for a support in conjunction with their mother, and the mother having violated that right by a sale of the land, an immediate right of action accrued to them, not only against their mother, but against her vendee, to have the sale set aside and the land restored to them for the purposes for which it was intended by the deviser; therefore, limitation began to run against them from the date of the sale, and not from the death of their mother.

2. Trustees—Adverse holding—The trustee having sold the land by deed of record, believing that she had the right to sell, the case does not come within the rule that the trustee of an express trust can not throw off his allegiance to his beneficiary and acquire a right to the trust property by adverse hold-

ing for the period prescribed by the statute of limitation unless his acts in that regard are so open and notorious as to take notice home to the beneficiary. The rights of the beneficiaries being immediately affected, it was their duty to take immediate action for the protection of their rights.

3. Limitation—'Thirty years' statute—No disability whatever can save the right to bring an action for the recovery of real property adversely held for a longer period than thirty years from the time the right of action first accrued.

4. Limitation—Pleading—While, as a general rule, the statute of limitation must be pleaded by the defendant, and can not be taken advantage of by demurrer, this rule does not apply when the petition shows that the action is barred, and that the plaintiff is not within any of the exceptions contained in the statute which save his right to sue.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Bennett.

L. J. Fleming died in Woodford county, Kentucky, the county of his residence, in the year 1848. He left a last will and testament, which was duly probated in the Woodford County Court.

In said will there is a clause as follows: "I next leave my land claims in Woodford and Scott counties, together with the negroes thereon, the stock of every kind, all the farming tools, household and kitchen furniture, to my wife, Nancy Fleming, for the support of all the family, and to be divided between her children by me at her discretion, to wit: John and James, Elizabeth, Louisa, Ann, Matilda, Sarah Allen."

That Nancy Fleming, while she claimed under the will and assumed the trust, never exercised the power conferred on her by the will to divide the land, or any part of it, between said children or any of them.

She did, on the 8th day of May, 1854, by deed, which was put to record in the proper office on the 10th day of June, 1854, sell the lands mentioned in said clause of the will to Willis F. Jones. The consideration expressed in the deed was \$32,684.75.

The said land is referred to in the deed as the same land she (Nancy Fleming) had the power to sell under said will.

The appellants, as a portion of the devisees under said will,

brought suit in the Woodford Circuit Court against the appellees to recover their moiety of said land.

The appellees claim title to said land through Willis F. Jones, the vendee of Nancy Fleming. The suit by appellants was brought more than thirty years after the deed by Nancy Fleming to Willis F. Jones was made and recorded.

The petition and amended petitions of appellants set forth the provisions of the will above quoted; also the date of the deed from Nancy Fleming to Willis F. Jones, which deed shows a title in fee was conveyed; also that appellees had held the possession of said land, without right, for more than five years next prior to the time of bringing the suit.

A demurrer was entered by the appellees to the petition and amended petitions, which the lower court sustained upon the ground that the statute of thirty years' limitation was a bar to appellants' right of action. Appellants declining to further amend, their petition was dismissed. They have appealed to this court.

The appellants contend that the will of L. J. Fleming, by the clause above quoted, gave to Nancy Fleming a life estate in the land mentioned, with remainder to the children named in said clause, subject to a discretionary power of appointment between them before her death; that Nancy Fleming having failed to exercise her discretionary power of appointment under the will during her life, the remainder interest of the children under the will could not take effect in possession until after her death, therefore, they had no right to sue for the possession of the land conveyed to Willis F. Jones until after the death of Nancy Fleming, which occurred within fifteen years next before they brought this suit.

In support of appellants' position they rely upon the cases of *Collins v. Carlyle*, 7 B. M., 14, and *McGaughey's Adm'r v. Henry, &c.*, 15 B. M., 397.

The provision of Carlyle's will was as follows: "As to my property and wealth, I first wish all of my just debts and funeral expenses punctually paid, and the balance of my estate

wholly I leave to my beloved wife, Nancy Carlyle, to be disposed of by her, and divided among my children at her discretion."

McGaughey willed to his wife 255 acres of land, which he set apart for her exclusive benefit, "to be disposed of in any way she may think proper, as life interest, and at her death or before to give said land to any one or more of her children as she may believe them most worthy or needy."

This court said in both of these cases that the wives under said wills took a life estate, with remainder to the children of the testator, subject to the discretionary power of appointment by the wives before their death.

The provisions of the wills construed by this court in those cases are unlike the provision of the will we are now construing in this. The provisions in those wills gave to the children of the testators no immediate right to the use or enjoyment of the estate devised. Their mothers under the wills had the exclusive right to the use and enjoyment of the estate during their lives, except as voluntarily relinquished by them under their power of appointment. Therefore, the children would have no interest in possession for which they could sue until after the death of their mothers.

The testator, by the clause of the will now under consideration, left the land in contest to his wife, Nancy Fleming, in trust, for the support of all the family, which meant the children, with the discretionary power of appointment between the children at any time before her death, subject to the actual appointment between the children.

They had an immediate right to the use and profits of said land for a support, not, however, to the exclusion of their mother.

The persons named as a class who were to have the benefit of an immediate and continuing support of the lands were certain, and the subject-matter out of which their support was to arise was certain, and the bequest as to that matter was imperative.

Therefore, if Mrs. Nancy Fleming, by the sale of this land in 1854, violated the rights of the family (children) of the devisor by depriving them of a support out of it, they had an immediate right of action, not only against Nancy Fleming, but against Willis F. Jones, to have said sale set aside, and the land restored to them for the purposes for which it was intended by the devisor. (Pomeroy's Equity Jurisprudence, section 835.)

As to the right of the appellants to sue for the recovery of the land being absolutely barred by the interposition of the thirty years' statute of limitation, section 4, article 1, chapter 71 of the General Statutes, says: "The period within which an action for the recovery of real property may be brought shall not, in any case, be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims, by reason of any death, or the existence or continuance of any disability whatever."

The foregoing statute, as construed by this court in the case of Medlock, &c. v. Suter, &c., 80 Ky., 101, and Connor and Wife v. Downer, &c., 4 Bush, 632, and, as its own language clearly imports, interposes an absolute bar to any right to bring an action for the recovery of real property after the lapse of thirty years from the time the right to bring the action first accrued. No disability of coverture, of infancy, or by reason of the existence of war between the claimant's country and that of the defendant, or any other "disability whatever," can save the right to bring an action for the recovery of real property adversely held for a longer period than thirty years from the time the right of action first accrued.

So the right of action of the appellants, Stillwell and wife, having accrued to them, and the right of action of the father of the other appellants having accrued to him immediately after the sale by Nancy Fleming to Willis F. Jones to have said conveyance set aside, and the land restored to them for their support, as provided for in the will of L. J. Fleming, it follows that their right of action to recover said land is absolutely barred by the lapse of thirty years.

The cases of *Chiles v. Drake*, 2 Met., 146; *Rankin v. Turney*, 2 Bush, 555, and *Board v. Jolly*, 5 Bush, 86, hold that, as a general rule, the statute of limitation, being regarded as a matter of strict defense, must be pleaded by the defendant. The reason of this requirement is to give the plaintiff an opportunity to show that he is entitled to the benefit of some of the exceptions in the statute, saving his right of action. But, as these cases show, the rule requiring the defendant to plead the statute when relied on in bar of the action does not apply when the petition shows that the action is barred, and that the plaintiff is not within any of the exceptions contained in the statute which save his right to sue.

The appellants' petition and amended petitions show that more than thirty years had elapsed from the time of said sale, when the right of action accrued, until they brought the suit; also that appellees had held the adverse possession of said land for more than five years next before the bringing of the suit. It is also a presumption, which is fortified by the facts stated in the petition, that the original vendee of the land, as well as his vendees, followed up the absolute right to the land which they acquired by the conveyances by taking and continuously holding the possession of it in their own right.

For the foregoing reasons we are of the opinion that the court did right in sustaining the demurrer to appellants' petition and amended petitions.

The proposition that the trustee of an express trust can not throw off his allegiance to his beneficiary and acquire a right to the trust property by adverse holding for the period prescribed by the statute of limitation, unless his acts in that regard are so open and notorious as to take notice home to the beneficiary, is not denied. But the case here does not come within that rule. Here Mrs. Fleming, as the deed shows, believed that she had the right under the will to sell the land. She did sell it by deed of record. She disposed of it as she believed she had the right to do. The rights of the beneficiaries were immediately affected by it. It was their duty, therefore,

to look after their interest, and to take immediate action when their rights under the will were violated.

The judgment of the lower court is affirmed.

Young & Trakue and W. S. Barbour for appellants.

Ed. M. Wallace and D. L. Thornton for appellees.

PRICE v. SIMPSON.

(Filed November 20, 1879—Not to be reported.)

Judicial sales—Advertisement—It is the duty of a commissioner to advertise the property he is ordered to sell, and he should not intrust that duty to others; if, however, he does not post the advertisements himself he must be able, when he makes his report, to state from his own knowledge that the property was advertised.

Appeal from Webster Circuit Court.

Opinion of the court by Chief Justice Pryor.

The exceptions to the commissioner's report of sale should have been sustained.

It is the duty of the commissioner to advertise the property ordered to be sold, and the practice indulged in by this class of officers, in employing others to post the advertisements as directed by the court, ought not to be tolerated. It not only produces litigation, but the commissioner is not able to report even that the property was advertised; and when called on to state how he knows the fact the inference is that he sent the advertisements by some neighbor or friend, and was informed by him that he had discharged the duty required to be performed by the commissioner.

The commissioner, when examined in this case, could not state that the property had been advertised as the law required.

If the commissioner intrusts this duty with his neighbors he must be able to state, when he makes his report, that the property was advertised.

The order confirming the report of sale is reversed and cause remanded, with directions to sustain the exceptions.

M. C. Givens for appellant.

LOUISVILLE INDUSTRIAL EXPOSITION v. JOHNSON, &c.
SAME v. SAME.

(Filed September 23, 1879—Not to be reported.)

1. Infants - Service of process—In an action by a guardian against his ward for the sale of the real estate of the ward, who is under fourteen years of age, service of process upon the infant and upon the plaintiff as guardian is sufficient.

2. Service of process upon an infant under fourteen years of age and upon his father is sufficient, although the father be a defendant and served as such, and not as father.

3. Where, in an action against infants under fourteen years of age, process has been served upon their stepfather, it should be presumed that he had the care and control of them.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Cofer.

As to the children of Robert A. Johnson, we think it is clear that the service of process was sufficient. It is true he was a party, and the service on him was as a party, but this made no difference. The sole object of the requirement that process against infants under fourteen years of age shall be served on some third person, is that notice of the suit should be brought to some one who would feel sufficient interest in the infant to appear and make defense of his interests or cause it to be done. The summons in this case notified the father that his children had been sued, and thus accomplished all that could have been accomplished if he had not been a party.

In *Shaefer v. Gates*, 2 B. Mon., 553, process was not served on the infants in person, but was served on their guardian ad litem, who was not a party. The question was whether that substitutionary service was sufficient, and the court held it was not. Denny had been appointed guardian ad litem after the process was issued, and had not accepted. He occupied no relation to the infants that made it his duty to defend for them, or which authorized service to be made on him for the infants. But in this case Robert A. Johnson was one of the persons designated by law to be served with process against his

children, and stood in the same position in that regard that the guardian ad litem would have occupied if he had accepted the trust, and had then been served for the infants, which, according to the doctrine of Gates & Bustard, would have been good service.

As to the children of Mrs. Johnson by her former marriage there is more room for doubt, but we incline to the opinion that it ought to be presumed that their stepfather had the care and control of them. Nor are we prepared to say that the service on the guardian was not good as to all in a case like that for the sale of their real estate. True, service upon him for them seems an idle formality. But when we consider the nature of the proceeding, and the fact that the guardian might have proceeded ex parte in the name of himself and wards, and without process in any form against them, to procure a judgment to sell their property, it does not appear so absurd to hold that process against them might be served on him as guardian to bring them into court where they could have the benefit of defense by a guardian ad litem.

In our opinion the service of process upon the infant and his father or guardian in such a case is sufficient, and the judgments appealed from are affirmed.

H. C. Pindell for appellant.

P. B. Muir for appellee.

[Note—This was an action by the guardian against the infants and their father for the sale of the real estate of the infants in which the father had a life estate. Process was served on the infants, on the plaintiff as their guardian, and on their father as a party defendant.]

MILLER v. DANIEL &c.

(Filed December 11, 1879—Not to be reported.)

Mortgages—Future advances—A mortgage to secure future advances is good, and the false statement in the mortgage that it was executed to secure a certain sum advanced at the time will not affect the mortgagee's lien for advances thereafter actually made on the faith of the mortgage unless this

statement in the mortgage was inserted for a fraudulent purpose, or unless the person claiming priority was misled by it to his prejudice.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Judge Hines.

To appellee's allegation of fraud in the execution of the mortgage appellant denies the fraud and alleges that it was executed to secure him in advances which he was thereafter to make to Haycraft, and that on the faith of the mortgage security he supplied Haycraft with goods to the value of \$54.55. To this answer no response was filed, and, therefore, it stands admitted that the mortgage was executed in good faith to secure these advances, while it is also admitted that the statement on the face of the mortgage that it was to secure the sum of \$150 that day advanced is in fact untrue. But unless this statement in the mortgage was inserted for a fraudulent purpose, or unless appellee was misled by it to his prejudice, it can not affect the validity of appellant's lien for the advances actually made on the faith of the mortgage. The form of this mortgage to secure future advances is usual, and has frequently received the sanction of the courts. (Jones on Mortgages, section 874.)

There is nothing in this record to show that the mortgage was either actually or constructively fraudulent. The court erred in postponing appellant's claim to that of appellee, as between them appellee's claim should have been subordinate.

Judgment reversed and cause remanded, with directions for further proceedings consistent with this opinion.

To the petition of counsel for appellee for a rehearing Judge Hines delivered the following response of the court:

Counsel are mistaken in supposing it necessary to overrule *Pierce, &c. v. Hall, &c.*, 12 Bush, 209, in order that the opinion in this case may stand.

The mortgage in that case is for no specific sum, and as it is the mortgage and not the note evidencing the debt that is to be notice to creditors and others, it results that the only notice given by the mortgage is of an indebtedness without limit.

Those having claims against the mortgagor or dealing with him were not under obligation to go to any other source than the mortgage for information. Counsel will also observe that in the Pierce case the court places stress upon the fact that the note exhibited is not the note described in the mortgage, and that as evidence it contradicts the averment of the petition.

In the case at bar appellee had acquired no claim to or lien upon the property prior to the creation of the mortgage debt, although appellees' claim was in existence at the time of the execution of the mortgage.

The rule laid down in the opinion is supported by citation of authorities (in Jones on Mortgages) from courts of last resort in Illinois, Missouri and New York, and, in our opinion, is consonant to reason and not in conflict with any opinion by this court.

Petition for rehearing overruled.

Williams & Power and Barnes & Williams for appellant.

Kincheloe & Eskridge for appellees.

KENTUCKY SUPERIOR COURT.

ENGLISH, &c. v. DYCUS, &c.

(Filed September 29, 1886.)

1. Official bonds—Sureties—Oral ratification of signing—Estoppel—Where it is the duty of the county judge to take, approve and test an official bond, and he accepts the bond with knowledge of facts which render the bond inoperative as to some of the sureties, none of the sureties are bound. The officer taking the bond must use ordinary care and prudence to protect sureties, and in such an official it is not consistent with ordinary care and prudence to be ignorant of the legal effect of the facts fully within his knowledge.

In this case the county judge having accepted the sheriff's county levy bond with knowledge of the fact that the name of two of the sureties were signed by another, without any written authority from them, none of the sureties are bound.

2. Where it is the duty of a court or officer to take, approve and test an official bond, any one signing as surety has the right to presume that those who have already apparently signed the bond, it being in the custody of the

court or officer, have done so as a matter of fact and of law, and he is not bound if any one of them has not done so.

3. When the power to do an act can be conferred only by writing, the act done can not be ratified orally.

Where one has given another oral authority to sign his name as surety, the signing pursuant thereto is not binding, and can not be ratified by any subsequent parol declarations.

4. Where one's name had been signed by another as surety upon a county levy bond pursuant to a mere oral authority, his statement to the county judge, after the bond had been accepted, that he was "on" the bond and "liable," was a mere conclusion of law, and does not preclude him from relying on the fact that his name was signed without any written authority from him, both the officer and the surety supposing that an oral authority was sufficient, and the statement of the surety being, in response to an inquiry, made for the purpose of ascertaining whether he had authorized his name to be signed.

5. Where a surety is not bound by reason of the fact that his name was signed without any written authority from him, he ought not to be precluded from showing that fact by reason of his declaration that he was "liable," unless he was aware that he was thereby assuming a greater liability than if he had actually signed his own name, which would be the result, as the surety can not forego his defense and then recover from the principal what he may pay.

Appeal from Marshall Circuit Court.

Opinion of the court by Presiding Judge Bowden.

This was an action by a creditor of Marshall county on the bond of the collector of the county levy. When taken the bond, so far as need be recited, was as follows:

"We, W. W. English, sheriff of Marshall county, and Wm. Harper, John English, Wilson English, W. C. Staton, Hugh English, W. W. Gilbert, H. H. Pace, C. N. Mooney, A. A. Nelson, J. K. Rose and W. S. Ivey, his surety, jointly and severally bind, etc. Witness our signatures this 4th day of June, 1883.

"W. W. ENGLISH,

his

"WM. X HARPER,

mark,

"JOHN ENGLISH,

By W. J. Wilson, Agent,

"WILSON ENGLISH,

By W. J. Wilson, Agent,

“W. C. STATON,

By W. J. Wilson, Agent,

- his

“HUGH X ENGLISH,

mark,

“W. W. GILBERT,

“H. H. PACE,

“C. N. MOONEY,

“A. A. NELSON,

“J. K. P. ROSE,

“W. S. IVEY.

“Attest: W. J. WILSON, Clerk.”

All were sued except Gilbert and Mooney, and each interposed a special plea of non est factum.

John English and Wilson English relied on the fact, admitted by the pleading, that neither of them signed the bond or the writing purporting to confer authority on W. J. Wilson to sign it for them.

To this the plaintiffs replied certain matters, to be noticed hereafter, as a ratification and estoppel.

The plaintiffs' evidence was substantially this: Neither John nor Wilson English could write their names; they had executed several bonds in previous years before the same county judge, and had invariably made their marks, but this fact the judge either did not know or had forgotten, if he had ever known it; the power of attorney was shown to him by W. W. English, and was read by him, and was then by him delivered to W. J. Wilson; the body of the power of attorney and the signatures to it were in the handwriting of W. W. English, with which the judge had been acquainted for some years, during which time English had been acting as sheriff. In the spring of 1884 the judge and the county attorney heard that both John and Wilson English “had said they were not liable on said bond, and did not sign it, or the power of attorney to W. J. Wilson, and that each of them claimed that they could not write their or his name.” The judge then investigated the matter and ascertained that neither of them could write

their names; he then consulted with the county attorney, and as a result of that conference a proceeding was begun in the county court May 27 to remove the collector unless he should give a new bond. June 2, while this proceeding was pending, W. W. English was in court to execute a bond for the collection of the revenue, and John and Wilson English were offered as sureties. After they "had been sworn to answer questions as to their liability," the county attorney, at the judge's instance, "asked both John and Wilson English if they, and each of them, were not on the county levy bond of W. W. English for the collection of the county levy of Marshall county for the year 1888, and liable thereon, and each of them answered, 'Yes.' " Because of this answer the proceeding against the collector was dropped. It may be assumed that both of these sureties knew that the collector had been and was then acting as such. This gives the full strength of the case made out by the plaintiffs' evidence. The defendants' motion for a peremptory instruction was overruled.

"No person shall be bound as the surety of another by the act of an agent unless the authority of the agent is in writing, signed by the principal; or if the principal do not write his name, then by his sign or mark, made in the presence of at least one creditable attesting witness."

It is conceded that neither was bound by the act of W. J. Wilson in signing their names to the bond, nor by the delivery of it; but it is insisted that each of them subsequently ratified those acts, and that each is estopped to deny their binding obligation.

Even conceding that each of them gave to W. W. English oral authority to sign his name to the power of attorney, it was not an act which could be ratified by any subsequent parol declarations. Where a valid power may be conferred orally, but was not in fact conferred, the act done may be afterwards ratified orally; but when the power can be conferred only by writing the act done can not be ratified orally. To hold that an oral recognition of an invalid oral authority renders the au-

thority itself valid is to give a force to the mere admission of a fact which the fact itself does not possess. It would in effect declare that though the statute will not permit any preceding oral authority to bind, the court will make a succeeding oral admission that there was such authority have a binding force. The statement of the proposition is enough. It was so held in *Rogers v. Chenault*, 78 Ky., 546, where it was said that to permit parol proof of a subsequent ratification would in effect nullify the statute.

Nor do we think that matter for an estoppel could have been extracted from the evidence. They knew their names had been signed to the bond, and that the collector was acting. That much could have been deduced; but there was no intimation that they had in fact ever had any doubt as to their liability until this action was begun, an aspect of the case which will be adverted to hereafter. Assuming that they had not, from the time the bond was executed, understood that their names were on it, it is impossible to tell when they first heard it; the utmost that could be said is that they knew it as early as June 2, 1884. How much did English collect after they ascertained the fact? Did any loss result from their silence? If so, how much? It can not be maintained that they are liable for any more by mere force of an estoppel, and this consequential loss must be shown, so that the measure of their liability can be fixed; otherwise it would give to their conduct the force of a ratification rather than of an estoppel, making them liable for all that the collector had collected and squandered before they had any information on which to act, the loss of which could not possibly be traced to anything said or done by them.

For what purpose did they appear before the county judge? What was the matter then under consideration? The evidence shows that this occurred June 2, 1884, when English was offering these two as sureties on his revenue bond, and that the county attorney was examining them in order to ascertain their existing liabilities, to determine their value on the bond then offered. In the spring of that year the county judge and county attorney had heard it rumored that John and Wilson

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English "were not liable" on the levy bond. May 27 the attorney entered a motion against the collector to require a new bond, but it does not appear that any surety had notice of this proceeding; no reference was made to it when the revenue bond was offered. It may be true that these officers had in mind the rumor they had heard, and the motion resulting, when John and Wilson were interrogated; but there is no intimation that either of these sureties had ever heard of the rumor or of the motion, or had any reason to suspect that their answers would or could, in any way, affect the question of their liability on the levy bond, or the conduct of the county officials in regard to the collector or his bond; the only questions then in hand related to the excess of their estates over their liabilities. The evidence leaves no room for doubt that if the questions asked them had called for the facts instead of a mere legal inference from the facts, they would have been given. The county judge had known the handwriting of the collector since he had been sheriff, and had examined the power of attorney before it was handed to W. J. Wilson to write the name to the bond; and he, therefore, knew the fact that John and Wilson English had not written their names to that paper; he saw it, and he knew they had not made their marks, and that there was no attesting witness. These were all the facts pertinent to the question that could have been drawn out by an examination, and all these were already known. It seems too obvious to dwell on, that at that time both the officers and the sureties had the same correct understanding as to the facts, and the same incorrect understanding as to the law. They all thought that an oral authority to write the name was sufficient, and the officers thought that the admission of the parties that they were "on" the bond and "liable" was sufficient evidence that a valid authority had been given. We have not been referred to any case in which such perfect concurrence in knowledge and opinion has been held to create an estoppel. Chenault, in regard to his name signed to a note to the payee, that "it was all right, the prin-

principal had authority to sign it;" and he was held not to be affected by his statement.

There is no intimation in the record that it was supposed by any one that John or Wilson English wrote his name to the power of attorney; the question was not whether the signatures were forgeries, but whether they had authorized them to be made. The pleadings so stated the issue. It must, therefore, be assumed that their statements that they were "on" the bond and were "liable," were understood as an admission merely that they had authorized W. J. English to sign their names to the power of attorney, which was then in the custody of the clerk of the court, appended to the bond. No other inference can be drawn from the evidence. It was known that they did not write their names to the power. Then came the rumor that they said they were not liable; the investigation then made brought out the fact that neither of them could write his name; so it was known, when they were examined June 2, that neither had signed, or could have signed, the paper. It is, therefore, incredible that either the judge or attorney understood them to say or to mean that they had signed the power; the form of the question shows exactly what was intended by the questioner and questioned. They were not asked as to any fact whatever, for the facts were all known; the purpose was to get a ratifying admission. Supposing the oral authority sufficient, they said they were on the bond and liable; the judge and attorney, being of the same opinion, were satisfied, and forebore proceedings. If the question had been whether their names had been written by themselves or had been forged, and they had admitted the signatures as genuine, as in *Rudd v. Matthews*, 79 Ky., 479, it would be a different matter; and it may be that in such a case their answers to the questions asked should be regarded as equivalent to an assertion that the signatures were genuine; but on the question as to the existence or nonexistence of authority, the answers are necessarily mere legal conclusions.

There is no suggestion of fraud in the signing of the names to the power of attorney. W. W. English had oral authority to sign, according to the verdict. If such authority were sufficient in law, there can be no doubt that the sureties would be bound. Evidently they intended that their names should be signed, and they expected to become thereby liable as sureties, with all the rights which sureties have. But not being bound by such signing, they failed to acquire those rights. They could not forego their defense, pay their part of the deficit, and then recover from W. W. English, the principal debtor. (Dawson v. Lee, 6 Ky. Law Rep., 413.) The contract asserted against them, therefore, is more burdensome than the one they intended to make. This resulted from the common mistake in regard to the law. It does not appear when they first learned that this mistake had been made, it may not have been until after they were sued, but it seems to us that they ought not to be precluded by such declarations as were proved, even if they were not legal conclusions, unless they then were aware that they were thereby assuming a liability much greater than that which they would have been under if they had signed their own names to the power of attorney or to the bond. An estoppel is intended to prevent the perpetration of an injury—not to inflict one. Here it would work a hardship, practically throwing on those who meant to be sureties the burden which lies justly on the principal only.

If the jury had believed all of the plaintiffs' evidence, and had found for them on every matter which it even tended to establish, it would not have shown either a ratification or an estoppel.

The plaintiffs' pleading and evidence showed that, June 4, the names of the principal and of all of the sureties, except Nelson, Rose and Ivey, were signed to the bond; and that the court, deeming the security insufficient, made an order extending the time to the 11th to complete the bond. That day Nelson, Rose and Ivey signed it, and it was then accepted and approved. It was shown that the names of sureties were not

written in the body of the bond until the evening of the 4th, after all the signatures of that day were written.

They who signed on the 4th incurred no liability by the mere act of signing; and until they had become bound by an acceptance of the bond each had the legal right to withdraw. (Fletcher v. Leight, 4 Bush, 303.) If it is assumed that signatures were written in the order in which they appear, Harper was the only one whose name was signed before those of John and Wilson English; but if that may not be assumed, and conceding that all other names were written before theirs were signed, still the fact would remain, that while the county judge may not have had any notice, when each surety signed that he had reason to believe that any one of the others would sign it, and signed upon that understanding, he knew, before the bond was accepted and became obligatory, that each who had signed was proposing to execute the bond and to become bound as a co-surety with all others who had signed, and with such others as might thereafter sign; and that John and Wilson English were to be jointly bound with the rest. And the bond was finally accepted as the bond of all. Those who signed on the 11th did so as the co-sureties of all who had theretofore signed.

During all this time, and before the bond was signed by even the principal, the county judge knew all the facts which rendered the signing of the names of John and Wilson English by W. J. Wilson inoperative and valueless. Whether they could or could not write was not important. The material fact was that they did not sign the power, and that the judge, knowing the handwriting of W. W. English, and knowing that he had signed their names, knew that they had not signed it. He clearly knew all the facts; he did not know their legal effect. There can be no doubt that he acted in good conscience. But it is equally clear that, as the result of his not knowing the existence or effect of a plain statute, he permitted sureties to sign and deliver a bond which, if valid, will subject them to a liability that they did not agree to assume.

In *Chamberlin v. Brewer*, 3 Bush, 561, the sureties alleged that they signed and acknowledged the bond in the presence of the county court, which, together with the principal, represented that D. V. Brewer, whose name was signed as a surety, had signed the bond, whereas he had not signed it. The court held that where it is the duty of a court or officer to take, approve and test an official bond, any one offering to sign as surety may presume that existing signatures on the bond, it being in the custody of the court or officer, are genuine; and common prudence does not require that he shall inquire into this, "and more especially when, as in this case, it is averred that the court represented that the party had signed it." The fact that there was an express representation is not regarded as material to the defense, but merely as leaving no room to doubt its validity. The right to assume that existing signatures are genuine arises out of the fact that such official bonds are all the time in the custody of the court, and are executed there; they are not signed and delivered in the country, or signed in the country to be delivered and acknowledged in court; and out of the further fact that it is the legal duty of the officer to see that the bond is executed properly. He must use ordinary care and prudence to protect sureties. (*Bracken County v. Daum*, 80 Ky., 388.) In such an official it is not consistent with ordinary care and prudence not to know the legal effect of the facts fully within his knowledge. Those offering to become sureties had the right to presume that he had taken care to have the signatures legally made so as to be binding.

Cook v. Boyd, 16 B. Mon., 556, is not a similar case. Boyd was the plaintiff in the attachment action against Bruce; the latter procured Hanley to sign the bond, and gave it to the sheriff, who then got Cook to sign it. Boyd had nothing to do with the matter; the sheriff was not his agent; he was not seeking to have the bond given, and, besides, had no notice; that was Bruce's business. *Terry v. Hazelwood*, 1 Duvall, 104, relied on *Cook v. Boyd*, and, as interpreted in *Hall v. Smith*, 14 Bush, 611, relates to the execution of a bond which was

not, like a sheriff's bond, to be prepared, kept, signed and acknowledged in court, but to one which could be, and was, signed in the country, and then delivered, in a completed form, to be approved by the mayor and council. The statute directs in regard to a sheriff's bond that the sureties shall be approved by the court, and that the bond shall be taken by its clerk under its supervision. If each surety, as he signs, may rely on the officers to see that all of the approved sureties sign the bond (*Fletcher v. Leight*, 4 Bush, 306), it is difficult to see why he may not as well rely on the assumption that those who have apparently signed have done so as matter of fact and of law. That which appears on such a bond, all the while in the custody of the court, is itself an assertion of its own verity; and so it was held in *Chamberlin v. Brewer*. The estoppel invoked in such cases as *Smith v. Moberly*, 10 B. Mon., 266; *Cook v. Boyd*; *Jones v. Shelbyville Ins. Co.*, 1 Met., 58, cannot find place where the county court has, and by law is required to have, its eye on the bond from beginning to end, to see that the sureties are solvent, and that they so execute the bond as to be bound by it.

It is clear that the defendants' evidence did not in any degree weaken their defenses.

The peremptory instruction ought to have been given. The judgment is affirmed as to W. W. English, and as to all other appellants it is reversed and the case is remanded, with directions to grant these appellants a new trial.

Gilbert & Reed and Wm. Lindsay for appellants.

J. M. Bigger for appellee.

COURT OF APPEALS ABSTRACTS.

SCHUHART v. CLARK.

Filed Oct. 2, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Chief Justice Pryor, reversing.

Judicial sales—Service of process on infants—The purchaser at judicial sale before he is required to accept title should know, or the chancellor for him, that the necessary parties were all before the court, and where the father and guardian of infants was served with process for them, and it does not appear whether they were under or over fourteen years of age, the service not being good if they were over fourteen, the purchaser can not be required to accept title unless it is made to appear that the infants were under fourteen when the process was served, or, if they were over fourteen unless an amended petition is filed making them and their guardian parties, and the title thereupon quieted. The fact that the statutory guardian of the infants answered for them does not dispense with the necessity of service of process on the infants.

O'Neal, Jackson & Phelps for appellant.

Wm. Mix for appellee.

MOCKBEE v. FIELDS.

Filed October 5, 1886. Appeal from Pendleton Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Appellate jurisdiction—An appeal may be taken directly to the Court of Appeals from the judgment of a county court dividing land.

2. Partition of land—In dividing land among heirs the mere fact that the husband of one of the heirs owned land adjoining that part of the land to be divided, upon which was a spring which the husband had used for years, and the use of which was valuable to his land, did not require that the part of the land upon which the spring was should be allotted to his wife, when to have done so would have made the other lots unshapely and without uniformity.

John H. Fryer for appellant.

J. T. Simon and P. F. Bonar for appellee.

DUGAN v. FERGUSON.

Filed October 5, 1886. Appeal from Carter Circuit Court. Opinion of the court by Judge Lewis, reversing.

Trespass—Pleading—The common law rule requiring the plaintiff to be in the actual possession of the land in order to maintain trespass *quare clausum fregit* is now in force in this State, the provision of the Revised Statutes allowing the owner to maintain such an action, although not in possession, not being embodied either in the General Statutes or in the Code. The averment in this case that the defendant "entered the close of the plaintiff,

that is to say, a certain tract of land and the lines and boundaries thereof," is not equivalent to an averment of either actual possession or ownership.

A. Duvall and J. D. Jones for appellant.

Wm. Bowling for appellee.

McCONNELL, &c. v. ROWE, &c.

Filed October 9, 1886. Appeal from Larue Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Judgment—Jurisdiction to enjoin—The court in which a judgment was rendered alone has the jurisdiction to enjoin it.

In this case the Larue Circuit Court had no power to enjoin a judgment rendered by the Ohio Quarterly Court.

2. Void judgments—That a personal judgment was rendered against a defendant individually, when it should have been against him as trustee, does not render the judgment void.

D. H. Smith for appellants.

W. F. Gregory and J. W. Twyman for appellees.

KLEIN v. GIBSON.

Filed October 9, 1886. Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor, affirming.

New trial—Newly-discovered evidence—Where evidence of a permanent and unerring character that could not have been produced by the use of reasonable diligence, and which, if unexplained, would have changed the result, is discovered after judgment, a new trial should be granted.

In this case the court holds the newly-discovered evidence was not of such a character, and that the lower court properly refused a new trial.

Wm. Lindsay and C. B. Seymour for appellant.

James S. Pirtle for appellee.

SPALDING v. MATTINGLY, &c.

Filed October 9, 1886. Appeal from Oldham Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Pledge of property with power to sell—A principal may vest his surety with the title to personal property for the purpose of selling it privately and applying the proceeds to the payment of the debt for which he is bound as surety, the balance of the funds, if any, to be paid to the principal. Such a bill of sale does not operate as a mortgage merely.

2. Principal and agent—The equitable rule which prevents an agent from dealing with his principal's property for his own benefit, inconsistent with the interest of the principal, applies only to agents who are relied upon for counsel and direction, and not to those who are employed merely as instruments in the performance of an appointed service, such as an employe to render manual labor for the principal without any power being delegated to him to act on behalf of the principal; such an employe may purchase the principal's property from any other person authorized to sell it as if he were a stranger.

Hill & Rives, W. E. & S. A. Russell and H. P. Cooper for appellant.

Rountree & Lisle and J. P. Thompson for appellees.

SIMMS v. CITY OF PARIS.

Filed October 16, 1886. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Municipal taxation—Where the location, division and arrangement of land within the limits of a town or city shows it to be intended, adapted and actually used for a town or city residence, and it is convenient to the business portion of the city, it is subject to taxation for municipal purposes. Taxation under such circumstances can not be regarded as taking private property for public use without compensation, or as subjecting the property owner to a local burden for the benefit of others without any benefit to the property owner.

In this case the residence of appellant and fifteen acres of land, none of which is used for agricultural purposes except a garden of one acre, is held to be subject to city taxation, a bridge across a creek running near the property affording appellant convenient access to the business portion of the city and its churches, schools, etc.

2. Under an act of the legislature extending the limits of the city and providing that "no lands within said extension used merely for agricultural purposes shall be subject to city taxation until the same shall be divided into and used as town lots of less than five acres," it is not necessary that land should be so divided in order to subject it to city taxation unless it is used merely for agricultural purposes.

R. H. Hanson for appellant.

T. C. Lyng for appellee.

McCHORD, NEAL & CO. v. NOE.

Filed October 19, 1886. Appeal from Washington Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Fraudulent conveyance—Husband and wife—A creditor sought to set aside a conveyance to the debtor's wife as constructively fraudulent upon the ground that the consideration had been paid by the husband. It appeared that after the deed was executed the wife borrowed money and mortgaged the property to secure the debt. Out of the money thus borrowed the husband paid the attacking creditor on his account a greater amount than he was owing him at the time the deed to the wife was executed. Held—That as the debt of the husband existing at the time the deed was made has been paid out of money for which the property is still liable, it would be inequitable to subject the property.

W. C. & C. C. McChord for appellants.

John W. Lewis for appellee.

DENGLER v. DENGLER.

Filed October 21, 1886. Appeal from Kenton Circuit Court. Opinion of the court by Chief Justice Pryor, dismissing.

1. Final order—Executors—This was an action to have the provisions of a will construed and to require the executrix, who was the testator's widow and also guardian of their children, to execute bond upon the ground that she was wasting the estate, the will providing that no bond should be re-

quired of her. The widow claimed that under the will she had the absolute power to dispose of the estate, and that the children were entitled to only so much of the estate as might remain undisposed of at her death. The chancellor referred the case to a commissioner to make a full settlement with the executrix and report, the order reciting that the widow held the estate as a trustee, and was disposed to disregard the trust, and reciting, further, that "when the report herein directed is made the court will be able to require a proper bond of the trustee, or appoint another to take her place." Held—That this is not a final judgment, and that no appeal lies.

2. A testator having made his wife the executrix of his estate and the guardian for their children, and provided that no security or inventory be taken, no bond can be required of her unless a purpose to waste the estate is shown.

C. L. Raison, Jr., and John J. Gasser for appellant.

Geo. R. McKee for appellee.

SNOW v. BURNETT.

Filed October 26, 1886. Appeal from Wayne Circuit Court. Opinion of the court by Judge Holt, reversing.

Partnership—Where one of two partners settled with a debtor of the firm, and took the debtor's note payable to himself alone for the amount which he claimed was his part of the debt, in an action by him upon the note the other partner had a right to be made a defendant and to assert his interest in the note, even though both the plaintiff and the debtor were entirely solvent, and the entire partnership claim collectible.

J. A. Brents for appellant.

J. Knox Frazer and Morrow & Newell for appellees.

BARBOUR v. SYKES.

Filed October 23, 1886. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Lewis, affirming.

Power of attorney—Construction—An agent was authorized by power of attorney to sell certain real estate of his principal which was mortgaged, and "to change any of the mortgages upon any of said lands by placing the same upon some other portion or tract, or upon the payment of a part of any one of said mortgages to execute a new note and mortgage for the residue upon the same or any other of said tracts of land, or to renew any of said mortgages." It does not appear that there was but one mortgage upon the property, and the agent, having sold a part of the property, paid off a part of this mortgage debt, the appellee, who was bound as surety, paying off the balance. Thereupon the agent executed to appellee a note for the amount so paid by him, and a mortgage upon the remaining property to secure it. Held—That the agent did not go beyond the scope of his authority in executing this note and mortgage, and that they are enforceable.

Helm & Bruce for appellant.

John L. Dodd for appellee.

McCLELLAND v. HAMILTON'S ADM'R.

Filed October 23, 1886. Appeal from Woodford Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Husband trustee for wife—A husband was made trustee for his wife and authorized to purchase with the trust fund real or personal estate, and engage generally in business for the benefit of the wife under her direction. The husband, being insolvent, traded and operated exclusively upon the trust fund, and added largely to it, but, as he states, seldom consulted his wife when making trades affecting the trust fund. In an action to subject the trust fund to the payment of a note executed by the husband as trustee, he claims that he had no authority to execute the note, and that the trust fund is not liable. Held—That he will not be allowed to contract debts as trustee and to execute notes in that capacity under the power given, and then deny the liability of the funds in his hands for their payment; nor can the beneficiary be allowed to reap all the benefits of the trustee's speculations, and then repudiate a single transaction because she did not consent to it.

Ed. M. Wallace and J. W. Rodman for appellant.

D. L. Thornton for appellee.

MARSHALL, &c. v. GREEN, &c.

HEDGES, &c. v. GREEN, &c.

Filed October 23, 1886. Appeals from Boone Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Executions—The fact that an execution does not conform to the judgment upon which it was issued as to interest does not render it void.

2. An execution defendant has no right to complain that others are improperly joined with him as defendants.

H. Clay White for appellants.

J. J. Landram for appellees.

TUTTLE, &c. v. TUTTLE'S EX'OR.

Filed October 28, 1886. Appeal from Clark Circuit Court. Opinion of the court by Judge Holt, affirming.

Construction of devise—A testator devised to his wife during widowhood a certain portion of his land "for the benefit of her and to raise my infant children." By the fourth clause of his will he directed that the remainder of his lands be rented out by his executor and the rents loaned out until the end of his wife's widowhood, and then that all his land be sold and all his cash equally divided, "except the charges hereafter made," among all his children. By still another clause the testator provided that if the means already provided for the benefit of his wife for the purpose of educating their children should fall short, his executor should furnish her with means. The executor was empowered to sell the lands if he deemed it to the interest of the testator's children, and to put the funds at interest. This is an action by the widow and other devisees against the executor to compel a division of the property named in the fourth clause of the will, or a division of its proceeds, the widow relinquishing all claim upon the property, and offering to care for the portion of the infants, for whom she is guardian, without charge. Held—That the estate

named in the fourth clause may be drawn upon for the support and education of the unmarried minor children constituting a part of the family, if the portion of the estate given to the widow at any time proves inadequate for that purpose; therefore, the minor children have a particular contingent interest in this property, in addition to their general interest in it with the adult children, and to divide it now would not only violate the plainly-declared intention of the testator, but would deprive the executor of the means which may become necessary to meet the possible demand upon him for the support and education of the infant children.

W. M. Beckner for appellants.

Haggard & Benton for appellee.

SIEVE, &c. v. STEINRIDE.

Filed October 30, 1886. Appeal from Kenton Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Family settlements—Compromise of threatened litigation—A court of equity will not hesitate to enforce a family settlement based upon a just and fair compromise.

A husband conveyed to his wife absolutely certain houses and lots, which comprised the greater part of his estate, which she had aided him in accumulating. The wife died without children, the husband surviving. After the wife's death her next of kin asserted claim to this property, but the husband denied their right, claiming that, by an agreement between him and his wife, the property was to go to the survivor. Litigation being threatened, a compromise was effected, which resulted in the conveyance by the husband to the wife's heirs of one-half of the property, and the conveyance by the heirs to the husband of the other half. Thereafter the heirs of the wife instituted this action to cancel their deed to the husband upon the ground that it was executed in ignorance of their rights, they being Germans, and was procured by misrepresentations made by the grantee. Held—That the heirs were fully apprised of their rights, and the compromise being a just and fair one, and preventing threatened litigation, the chancellor will uphold it.

H. P. Whitaker and A. Duvall for appellants.

Wm. Lindsay, Simmons & Schmidt and A. C. Ellis for appellee.

BUCKNER'S HEIRS v. HENDRICK.

Filed October 30, 1886. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Boundary—Fixing lost corners—"That lost corners are to be found by running the courses and distances from known corners to the intersection of the lines, allowing such variations from the true meridian as are found to exist on the ascertained lines," is a correct rule of law for fixing lost corners, but it can not be used for determining the disputed line in this case, the actual location of both corners of that line being the matter in controversy.

2. "Courses and distances" must not merely govern as a matter of law in establishing lines and corners when there is no satisfactory proof of their

actual location as matter of fact, but they are competent as evidence of such fact and should not be excluded from the consideration of the jury for that purpose. It was, therefore, misleading in this case to instruct the jury that if they believed the disputed line and corners were never marked, or that the lines had been effaced, or could not be ascertained by proof, "the patent courses and distances must govern as to such line."

John H. Fryer and T. F. Hallam for appellants.

L. T. Applegate for appellee.

**TURNPIKE COMMISSIONERS v. LOUISVILLE & NASHVILLE R.
R. CO.**

Filed October 30, 1886. Appeal from Oldham Circuit Court. Opinion of the court by Judge Holt, affirming.

Taxation—Collection of taxes by suit—The assessment or collection of taxes is not an inherent power of the judiciary, nor are the courts tax collectors. Therefore, if the means provided by the legislature for the collection of taxes are inadequate, amended legislation should be had to remedy the defect. Cases might perhaps arise of such a peculiar character, and where the remedy provided might be so ineffectual as to justify a resort to judicial proceedings, but such a case is not here presented.

In this case it is sought to tax the property of a railroad in a voting precinct for turnpike purposes under an act of the legislature authorizing the taxation of other property in the precinct for that purpose, the general law providing that "the same rate of taxation for the purpose of each county, city, town or precinct in which any portion of any railroad is located, which is or may be in any year levied on other real estate therein, shall be levied and is hereby levied on the value of the real estate of said company therein."

Held—That even if the assessment of the other property in the precinct is sufficient to authorize the taxation of the property of the railroad therein, the tax can not be collected by suit, neither the special act nor the general law authorizing its collection in that way.

Ben. S. Robbins for appellants.

Wm. Lindsay, D. H. French and Carroll & Clore for appellee.

LADD'S ADM'R v. BROWN.

Filed October 12, 1886. Appeal from Christian Circuit Court. Opinion of the court by Judge Lewis, reversing.

A deed from father to son claimed to have been made pursuant to a verbal contract for the sale of the land made more than eighteen years before the deed was executed, or all the pretended consideration was paid, is set aside as fraudulent, having been executed about the time the plaintiff obtained his judgment against the grantor.

J. I. Landes and Joe McCarroll for appellant.

L. A. Sybert for appellee.

WIGGINS v. JOHNSON, &c.

Filed October 12, 1886. Appeal from Robertson Circuit Court. Opinion of the court by Judge Holt, affirming.

1. Husband and wife—All the personal property of the wife at her mar-

riage, or which she may thereafter acquire during marriage, unless it be her separate estate, belongs to the husband.

2. Feme sole—A decree of court empowering a married woman "to buy and sell, contract, etc., and do business as a feme sole," is broad enough to embrace the right upon her part to hold and enjoy the proceeds of her own land.

3. Profits of wife's general estate—If the husband desires to convert the wife's earnings or the profits arising from her general estate into her separate estate, to be used by her to his exclusion, he can do so by the aid of the statute authorizing courts of equity to make her a feme sole.

Therefore, land purchased by a married woman who had been made a feme sole by decree of court is not liable for the husband's debts, although it was paid for with the profits arising from her general estate prior to the date of the decree.

Winfield Buckler for appellant.

A. Duvall for appellees.

FITE v. ORR'S ASS'EE, &c.

Filed October 12, 1886. Appeal from Robertson Circuit Court. Opinion of the court by Judge Bennett, reversing.

1. Statute of frauds—Verbal sales of land—The vendee under a verbal contract for the sale of land is not bound to accept a deed or pay for it, although put in possession by the vendor. The vendor is clearly within the protection of the statute of frauds, and the contract to be binding on either party must be mutually binding on both.

2. Allegation of heirship—An allegation that certain persons "are the only heirs" of another is but a conclusion of law. A party who claims his title or right to property by reason of his heirship must set out the degree of relationship in which he stands to the person through whom he claims, and also show that there are none standing in a nearer degree of relationship.

Deming & Owens for appellant.

A. Duvall for appellees.

HAHN v. HENRY, &c.

Filed September 30, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Holt, affirming.

Jurisdiction of Superior Court—Cross appeal—The Superior Court having no jurisdiction of a case has no power to take any steps in it save to transfer it to this court. Therefore, this court can not consider a cross appeal granted by the Superior Court in this case prior to its transfer to this court, that court having no jurisdiction of the case.

Lane & Burnett for appellant.

Helin & Bruce for appellees.

PATRICK v. DAY, &c.

Filed September 30, 1886. Appeal from Morgan Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Exceptions to depositions—Waiver—Upon appeal exceptions to depositions will be treated as waived unless acted upon in the court below.

2. Disputed boundary—Parol proof of arbitration—The statement of a wit-

ness that fifty years before his deposition was given a question of disputed boundary was settled by arbitration, and a particular line agreed upon and reported by the arbitrators, should not be allowed to defeat the claim of one who exhibits a complete chain of title to the land in dispute, coupled with testimony conducing strongly to show that the parties have been in the actual possession all the while, claiming to the extent of their boundary, although such parol proof would be persuasive, coupled with an actual or constructive possession, where there was no written evidence of an adverse claim and holding under it.

Hazelrigg & Orear for appellant.

Wood & Day for appellees.

VINSON v. FREESE.

Filed September 30, 1886. Appeal from Boyd Circuit Court. Opinion of the court by Chief Justice Pryor, dismissing.

Appeals—Final order—In a suit for the settlement of a partnership, in which the accounts were referred to a commissioner, a judgment confirming the commissioner's report in part and rejecting it in part, and again referring the case to him for final adjustment, is not a final order from which an appeal can be prosecuted.

L. T. Moore, K. F. Prichard and Wm. Lindsay for appellant.

Brown & Brown and W. C. Ireland for appellee.

TURNER, &c. v. COMMONWEALTH.

Filed September 30, 1886. Appeal from Clay Circuit Court. Opinion of the court by Chief Justice Pryor, striking from docket.

1. Constitutional law—Appeals in criminal cases—The right to an appeal in felony cases is not a constitutional right, and the accused, having had his trial below, must conform to the rules prescribed by law for bringing his case to this court and to the practice adopted here as to its final disposition, and where there is a failure to prosecute the appeal a dismissal necessarily follows.

2. Nonsuit—Reinstatement—While a suggestion that a prisoner appealing is without counsel, or unable to employ counsel, would require the interposition of this court in his behalf, yet after the lapse of many years this court can not rehear a case which was dismissed for want of prosecution, simply because counsel neglected the case or the condemned was unable to employ counsel, although the condemned has all the time been confined within the walls of a prison.

The court, after the lapse of twelve years, refuses to rehear this case which was dismissed for want of prosecution, but has examined the facts and discusses them for the purpose of showing that the court must have had a knowledge of the case by an inspection of the record before the nonsuit was entered.

Ira Julian for appellants.

P. W. Hardin for appellee.

COMMONWEALTH v. BOGIE.

Filed September 25, 1886. Appeal from Madison Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Towns and cities—Implied repeal of local option—Where the new charter

of a town which changed essentially the city government and converted the town into a city empowered the city council to "license, tax and regulate" all taverns, saloons, etc., but provided that this power should be subject to the right of the citizens "to vote into operation the general law known as the local option law within the limits of said city," it had the effect to repeal the local option law which was already in force in the town by reason of its having been voted in the district of which the town was a part, such being clearly the legislative intent.

P. W. Hardin for appellant.

C. F. & A. R. Burnam for appellee.

BROWN, &c. v. SWIFT, &c.

Filed September 28, 1886. Appeal from Butler Circuit Court. Opinion of the court by Judge Bennett, affirming.

Deeds—Certificate—Under the act of 1792 it was necessary that deeds acknowledged before two justices of the peace in a county different from that where the land was situated should be subscribed, as well as acknowledged, in the presence of the justices, and that their certificate should show that fact, and the failure of the certificate to show that fact renders such a deed incompetent as evidence unless otherwise proved.

In this case the certificate of the justices that the grantors personally appeared "and acknowledged this indenture, by them subscribed, to be their act and deed," is not sufficient to show that the grantors subscribed in the presence of the justices.

G. W. Stone for appellants.

H. T. Clark for appellees.

KINNEY, &c. v. TRUSTEES OF SHELBYVILLE.

Filed September 28, 1886. Appeal from Shelby Circuit Court. Opinion of the court by Judge Holt, reversing.

Conveyance of easement—Condition broken—Acquiescence—The owner of a town lot conveyed to the trustees of the town the right to use a strip of ground adjoining it as an alley upon condition that the town would keep it in repair, the conveyance providing that upon the failure of the trustees to comply with this condition the strip of ground should revert to the grantor. The town failing to keep the ally in repair, the heirs of the grantor instituted this action to recover the land. Held—That, they are entitled to recover, as an acquiescence upon their part can not be presumed from the lapse of time, nothing appearing to show when the condition was first broken; nor does the fact that the plaintiffs do not now own the property abutting upon the alley authorize the court to refuse the relief, the present owners of the abutting property not being parties to the action, and their rights not being in issue.

G. N. Robinson for appellants.

Caldwell & Harwood for appellees.

SHERLEY v. THOMASSON'S EX'OR.

HEYMAN v. SAME.

Filed September 28, 1886. Appeals from Louisville Chancery Court. Opinion of the court by Chief Justice Pryor, affirming.

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Partnership real estate—Death of partner—Title of purchaser—One of several partners engaged in the purchase and sale of real estate having died, an action was instituted against the surviving partners to enforce a vendor's lien upon the partnership real estate, and to coerce the payment of partnership liabilities. The executors of the deceased partner, to whom the testator's real estate was devised with full power to sell, were made parties to the action, and the trustee of the heirs of the deceased partner filed a cross petition asking a sale of the property to pay a mortgage that had been given by the surviving partners to the executor of the deceased partner, and by the executors assigned to the trustee, the mortgage being given for money advanced to the partnership by the testator in his lifetime. The real estate was sold to satisfy first the vendor's lien, then the claims of partnership creditors, and then the mortgage. The purchasers appeal from a judgment confirming the report of sale. Held—That the title passed, the executors in whom was vested the title and the trustees of the heirs being parties. The wives of the surviving partners were not necessary parties, there being no right of dower.

D. I. Heyman and Goodloe & Roberts for appellants.

Bacon & Stites for appellee.

SUPERIOR COURT ABSTRACTS.

SWEENEY v. RAY, & Co.

Filed September 29, 1886. Appeal from Garrard Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. When one is entitled to a homestead in property which is worth more than \$1,000, and is not divisible without great diminution of its value, his right to \$1,000 in money out of the proceeds extends to every part of the home place, and where different persons hold liens on different parts of the property one part can not be made to bear the entire burden of the homestead, but it must be apportioned ratably.

The owner of a house and lot, which he used as a home, purchased a rear lot, upon which he built outhouses and used it as a part of the home place. He mortgaged the house and front lot to appellee. Appellant then had an execution levied on the property embraced in the mortgage and purchased at the execution sale subject to the encumbrance. After appellant's purchase the debtor mortgaged also the rear lot to appellee. Appellant seeks to enforce the lien he acquired as purchaser of the encumbered property. The debtor claims a homestead. It appears that the front lot is worth more than \$1,000 and is not divisible, and that both lots sold together will bring much more than if sold separately.

Held—That the entire property should be sold, the values of the two lots ascertained and each be made to bear its ratable share of the \$1,000; the

residue of the money arising from the sale should be divided in the ratio of the values of the two lots; that part thus going to the rear lot should go to the mortgage on it; the other part should go, first, to the mortgage on the front lot, and the residue to the appellant, the execution purchaser. Appellant's rights were fixed by his purchase, and were not affected by the subsequent mortgage of the rear lot.

2. Whether or not the plaintiff in an execution who purchases at the sale thereunder, mortgaged property in which the defendant is entitled to a homestead, can be regarded as acquiring the statutory lien as a purchaser of encumbered property, he certainly has an execution lien for the amount of his judgment, and if he asserts the right of the purchaser, that being the less favorable to him, the court will consider that his interest.

H. C. Kauffman for appellant.

W. McKee Duncan for appellees.

COMMONWEALTH v. FIELDER.

Filed September 29, 1886. Appeal from Louisville City Court. Opinion of the court by Judge Ward, dismissing.

Final order—An appeal does not lie from an order quashing a capias where no rights had been secured to the plaintiff which did not exist under the judgment independent of the writ of execution.

P. W. Hardin for appellant.

Kohn & Barker for appellee.

ALLEN v. COMMONWEALTH.

Filed September 29, 1886. Appeal from Butler Circuit Court. Opinion of the court by Judge Ward, affirming.

Bail bond—The fact that a bail bond taken by the sheriff of Grayson county had at the head thereof the words "Butler Co. Court, Feb. Term, 1884," did not invalidate the bond. An allegation that the bond shows on its face that it was taken in the Butler County Court is not an allegation that it was so taken.

B. L. D. & E. D. Guffy for appellant.

P. W. Hardin for appellee.

YOUNG v. EVANS.

Filed September 29, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

Contract—A person can not contract for the payment of his own debts by agreeing to withhold opposition to the allowance of a claim against the estate of another.

An agreement by appellant to cancel his debt against appellee in consideration of her withholding exceptions to a claim asserted by him against the estate of her deceased daughter can not be enforced.

Wm. McKee Duncan for appellant.

A. E. Willson for appellee.

WILLIS, &c. v. BRASSFIELD, &c.

Filed September 29, 1886. Appeal from Whitley Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Pleading—Petition on account—A petition alleging that the defendant agreed and promised to pay a certain sum "for merchandise sold and deliv-

ered" is defective in that it does not allege to whom the goods were sold or delivered.

2. Petition on account—A petition alleging that the defendant is indebted to the plaintiff in a certain sum for labor done and provisions furnished without alleging that the labor was done or the provisions furnished at the defendant's instance or request, or that the prices charged were reasonable, or that the defendant agreed or promised to pay, is not good.

3. Act of 1856—Limitation—Under the statute which requires an action to have a transfer of property declared to operate as an assignment for the benefit of creditors to be brought within six months, limitation begins to run from the date of the delivery of the property, and not from the time when the attacking creditor first discovers that the sale or transfer was made with the design to prefer.

Collins & Fenley for appellants.

R. D. Hill for appellees.

POPE v. CAIN, &c.

Filed September 29, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, dismissing.

Appellate jurisdiction—Final order—A final order is one which determines the rights of the parties and places it beyond the power of the court after the term at which it is rendered to afford any relief contrary thereto. An order holding that the appellant is not entitled to any part of an insurance fund in controversy, except to the extent of premiums paid by him and any debt he may have against the insured, and referring the case to the master commissioner to take proof as to the premiums paid by appellant and as to any debt he may have had against the insured, is not final.

Sweeney & Son for appellant.

John H. McHenry for appellees.

McCLINTOCK v. EMICK, STINER & CO.

Filed September 29, 1886. Appeal from Harrison Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Sales of personal property—Warranty—Every statement of a vendor of personal property in regard to the quality or condition of the thing sold is not necessarily a warranty. It is only so when it was so intended, and, as that intention is a fact, it must be alleged in order to show that the statement was not in praise or commendation, nor of opinion or judgment, but as of an assurance to be relied on and as an inducement to the purchase.

In this action to recover damages on account of the loss of mules alleged to have been diseased when sold, the allegation that the defendant at the time of the sale represented that the mules were "all right," and that the plaintiff relied upon the statement and was induced thereby to make the purchase, is not sufficient to show that there was a warranty of soundness, as the expression "all right" does not ordinarily mean that the thing referred to is right in every particular, but that it is right in some single particular under consideration.

2. Instructions—Where, in an action for a breach of warranty as to soundness in the sale of personal property, the only evidence of a representation

as to soundness was that the vendor had said that the thing sold was "a right." it should have been left to the jury to say whether by those words the soundness of the thing sold was intended to be asserted and assured, and whether the parties so understood it. The court by instructing the jury that a representation as to soundness, relied upon by the vendee and made by the vendor with that intention, amounted to a warranty, and further instructing them that if the defendant warranted the mules to be sound, and they were unsound, they should find for the plaintiff, in effect determined that the phrase "all right" was the equivalent of "sound," which was error.

J. Q. Ward for appellant.

Martin & Ratcliff for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. SPALDING, MIMMS & CO.

Filed September 29, 1886. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Railroads—Transportation of stock—Although under a contract made with a railroad company for the shipment of stock it may have been the duty of the shipper to go along and look after his stock, or have an agent to do so, yet if the company, notified that no one would go in charge, nevertheless undertook to carry the stock, its duty was the same as if he had not agreed to go or send an agent.

2. Negligence—A railroad company can not by contract relieve itself from loss occasioned by its own negligence, nor can it limit its liability therefor.

3. Presumption—If live stock is in good condition when delivered to a railroad company for transportation, and is injured while in its possession, the presumption is that the injury resulted from its negligence unless the shipper or his agent was in actual charge, even though he agreed to go or send some one in charge.

4. Special verdict—The defendant having moved the court to order a special verdict, and submitted questions to be answered by the jury, and it being clear that a finding favorable to the company on some of the questions would have been inconsistent with a general verdict for the plaintiff, it was imperative that the court should direct the jury to find upon the issues or facts embraced by the questions, although it would have been proper for the court to reform the questions so as to elicit the facts inquired for.

W. Lindsay and W. J. Lisle for appellant.

Russell & Avritt for appellees.

SIMPSONVILLE AND FISHERVILLE TURNPIKE CO. v. FRENCH.

Filed September 29, 1886. Appeal from Shelby Circuit Court. Response of the court by Judge Barbour, to petition by appellee for rehearing.

1. Proceeding to close road—The law providing the manner of proceeding to close or discontinue roads is to be found in article 1 of chapter 94 of the General Statutes, and this proceeding must be adopted as well by turnpike companies as by other persons.

2. Appeals in road cases—Upon appeal to the circuit court from an order of the county court closing a road the case is to be considered as an appeal

upon the law and facts originating in the county court, and no evidence can be heard other than that contained in the bill of exceptions. Nor does the fact that new evidence is heard in the circuit court without objection confer upon that court jurisdiction to try the case de novo.

3. Report of viewers—Where, in a proceeding in the county court to close a road, the viewers appointed report adversely to the closing of the road, the court may sustain exceptions to their report and order the road closed without appointing other viewers and waiting for their report.

To this last proposition Judge Bowden dissents.

E. Frazier and Bullock & Beckham for appellant.

G. N. Robinson and Wm. Lindsay for appellee.

MAUPIN & OREAR'S ASS'ES v. EVERETT, &c.

Filed September 29, 1886. Appeal from Montgomery Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Costs—While the party who succeeds upon the merits or otherwise in an equitable action is entitled to a judgment for cost, except in certain cases where they may be apportioned, yet the chancellor may prevent prolixity of pleading and the taking of unnecessary evidence, and to that end may require the party in fault to pay the extra cost occasioned thereby. In view of this rule the court did not abuse its discretion in giving to appellants a judgment for only two-thirds of their cost, although they succeeded on the merits.

2. Failure of collecting officer to pay over money—The provision of the statute that when a sheriff "or other like officer" fails to pay over upon demand money received by him on any writ of execution or other precept, he and his sureties shall be liable for 15 per cent. interest thereon and costs of recovery, legal and extraordinary, even if it be held to apply to a city collector, was only intended to apply when the officer acted under, and in obedience to, a process of law in making a collection, and does not apply where he acted because he had been selected as a collecting officer by the party for whom the collection was made, and without any other or greater authority than a collecting agent.

3. Compensation of agent—While as a general rule an agent who fails to keep and render accounts, and who fails on demand to pay what he has collected, may not be entitled to compensation, still if he is made to account for interest and damages he should be allowed compensation.

4. Assignee for benefit of creditors—The provision of the statute requiring trustees for the benefit of creditors to have the deed of trust recorded, and to qualify by taking the oath and giving bond, as required by the statute, before entering upon the discharge of their duties, was intended for the protection of the beneficiaries under such assignments, and not to authorize persons who deal with such trustees to call in question, in a collateral proceeding, the authority of such trustees.

James H. Hazelrigg, H. L. Stone and R. A. Mitchell for appellants.

W. H. Holt for appellees.

WATHEN v. LEE.

Filed October 8, 1883. Appeal from Marion Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Warranty—Rents—Upon the breach of a contract of warranty in the sale of land the warrantor is not liable for rents, as such, recovered against the warrantee in possession and in receipt of the profits.

2. Mistake in deed—Where a deed is sought to be reformed upon the ground of mistake, and one party gives one version of the verbal contract and the other a radically different version, the attorney who wrote the deed not remembering what occurred, this is not such evidence as the law requires to overcome the presumption that the writing contained the contract made by the parties.

Thompson & McChord for appellant.

Samuel Avritt for appellee.

SIMPSON v. STARNES.

Filed October 8, 1886. Appeal from Grant Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Attachments—Insolvency no ground—That the defendant has not enough property in the State to satisfy the plaintiff's demand is not a ground for an attachment when the plaintiff's debt is not due, and even when the debt is due mere insolvency is not a ground for an attachment; it must be alleged that the defendant has not sufficient property in the State subject to execution to pay that demand.

Warren Montfort for appellant.

PAGE v. STAGAMAN.

Filed October 8, 1886. Appeal from Campbell Chancery Court. Opinion of the court by Presiding Judge Bowden, affirming.

Pleading—Petition on account—In an action against the real representative of a decedent to subject the estate descended to the payment of a claim for the burial expenses of the decedent, the petition alleged that the estate was indebted to him in a certain sum "for services rendered on account for the defendant for burying the said decedent." Held—That the petition was defective in that it did not allege that the plaintiff furnished anything, nor that the services rendered were worth the amount charged, nor at whose request, nor upon whose credit the services were rendered.

J. S. Ducker for appellant.

GARVEY, FELTMAN & CO. v. MEGUIAR, HELM & CO.

Filed October 8, 1886. Appeal from Owen Circuit Court. Opinion of the court by Judge Ward, affirming.

Fraudulent preference—C., who was insolvent, made a public sale of a portion of his personal property. W., who was a creditor of an insolvent firm of which C. was a member, purchased a horse at the sale, and afterward paid for it by surrendering to C. the firm note. Held—That this was not a device resorted to by C. to prefer W. to the exclusion of his other creditors, there being nothing whatever to show that C. expected W. or any

other creditor to bid for his property and pay for it with debts they held against him. Nor did the fact that the members of the firm agreed that C. should pay the firm debt to W. with the debt which W. owed him alter the case, the right of set-off being secured to W. by law.

J. W. Greene for appellants.

Montgomery, Lindsay & Botts for appellees.

BELKNAP & CO. v. CARPENTER.

Filed October 8, 1886. Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Ward, affirming.

Exemptions—Personal privilege—Under the exemption act of 1884, which applies only to debts contracted subsequent to June 1, 1884, the debtor himself is the only person who can claim that he is entitled to have certain property set apart to him in lieu of that specifically exempt, but not owned by him, and if he fails to make the claim the law will not interpose for the purpose of taking it away from one creditor and giving it to another, but will allow it to the one who under the law has the older *prima facie* claim or lien upon it.

In this contest between an attaching creditor, whose debt was created prior to June 1, 1884, and a landlord claiming a lien upon the attached property for rent accrued subsequent to June 1, 1884, the tenant failing to claim the property as exempt from the landlord's claim, the attaching creditor is not entitled to show that the tenant could do so, the property not being specifically exempt. The property being *prima facie* liable to the lien of the landlord, it will be subjected thereto, the owner himself being the only one entitled to rebut that *prima facie* presumption.

O. H. Harrison for appellants.

Bland Ballard for appellee.

FRAZER v. HARDY.

Filed October 8, 1886. Appeal from Logan Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Practice—Failure to give leave to amend—While it was not proper for the court, after overruling a demurrer to an answer, to hold the answer to be bad without giving leave to amend, yet as the defendant did not ask to amend, or move to set aside the judgment because of surprise, and with said motion present a substantial defense, this court can not know that he had any defense, and consequently can not know that he was prejudiced by the action of the court.

2. Pleading—Assignment—In an action upon an assigned note, the petition alleging that the payee assigned the note "as appears by written transfer on the back of said note," the denial of the answer that the payee assigned the note is a mere conclusion, and not good.

W. W. Lyles for appellant.

Browder & Edwards for appellee.

DUFF v. HAGINS.

Filed October 8, 1886. Appeal from Breathitt Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Bankruptcy—New promise—A promise to pay upon conditions a debt from the payment of which the party has been discharged in bankruptcy can not be enforced without an allegation that the conditions have been performed.

In an action to recover a debt which had been discharged in bankruptcy the plaintiff alleged a promise by the defendant to pay made after his discharge. The defendant denied an unconditional promise to pay, but admitted a promise upon conditions which he alleged had not been fulfilled. Held—That the answer was good.

2. Practice—A motion by the plaintiff for judgment upon the petition and answer was in effect a demurrer to the answer, and as the answer stated facts sufficient to constitute a defense the motion should have been overruled.

W. L. Hurst and John L. Scott for appellant.

Wood & Day for appellee.

PRESTON v. CORNELL, &c.

Filed October 8, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

Street improvements—Uncertainty of ordinance—An ordinance providing that the unpaved portions of the sidewalk on the south side of a certain street, between certain other streets, should be "graded, furnished with metal gutters and paved" in accordance with a "general ordinance concerning the improvement of sidewalks," was sufficiently certain and definite, the amount of grading required, the slope or pitch in the walk, the quality and kind of material to be used, and the manner in which the work was to be done, all being specifically fixed by the general ordinance referred to, and not left to the discretion of the engineer. It is not necessary that such an ordinance should define the number of square feet of pavement that is laid on the improved part, or the number of square feet to be improved.

Elliott & Hemingray for appellant.

H. M. Lane for appellees.

OSBORNE v. TRAYLOR.

Filed October 13, 1886. Appeal from Caldwell Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Sales of personal property—Warranty—When a vendee of personal property has agreed that if there shall be a breach of a warranty he shall return the thing itself, its return is the only condition on which he can rely on the broken warranty.

2. Failure to give opportunity to remedy defect—Where the purchaser of a machine agreed that if it proved defective he would give prompt notice to the agent of whom he purchased it, and allow time for a person to be sent to put it in order, and then if the defect was not remedied that he would return it to the agent and have his money or notes returned, the purchaser was not entitled to return the machine because of a defect which he had not given the vendor an opportunity to remedy, and he can not resist the payment of the purchase price because of such defect.

F. W. Darby for appellant.

James R. Hewlett for appellee.

EDWARDS, &c. v. CLOYD'S ADM'R.

Filed October 13, 1886. Appeal from Larue Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Attachments—It was error to sustain an attachment before it was adjudged that the plaintiffs had a claim against the defendant to which the proceeds of the attached property could be subjected.

2. Assignment—Priority over attachment—It was error to dismiss the petition of the claimant of the proceeds of attached notes, the evidence that the notes were sold, assigned and delivered by the defendant to the claimant before the action was begun, not in anticipation of it and for value, being clear and uncontradicted.

J. W. Twyman for appellants.

D. H. Smith for appellee.

PARSONS v. ROACH.

Filed October 13, 1886. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, reversing.

Partition—Deeds—Warranty—A life tenant and remaindermen executed an instrument, in form a double indenture, which purported to be a surrender by the life tenant of her life estate to the remaindermen, and a partition and conveyance by them to each other, with warranty. Held—That the effect is the same as if the life tenant had, by a separate deed, conveyed her interest to the remaindermen as a class, and they had then made deeds of partition among themselves. The life tenant, therefore, did not warrant the title to the lots conveyed by the several remaindermen to each other, and is not liable to the vendee of one of them by reason of an encumbrance existing when the deed of partition was made.

Harrison & McGrain for appellant.

F. Hagan for appellee.

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KENTUCKY COURT OF APPEALS.

CITY OF LOUISVILLE v. WIBLE & WILLINGER.

WIBLE & WILLINGER v. STRUSS & CO.

(Filed September 30, 1886.)

1. Municipal corporations—Police power—Contract for privilege of removing bodies of dead animals—While the power of the State to protect the public health through her towns, cities and their public agencies can not be relinquished or surrendered, yet the State, or its municipalities intrusted with the execution of this power, may make such contracts as will attain this end, and while the power must remain in the State or city to modify or recall such contracts if they do not accomplish their purpose, neither the State nor the city can be allowed to disregard or recall its contract upon its mere caprice, or to gain a pecuniary advantage.

A city made a contract with an individual whereby it granted to him the exclusive right for five years to the use of its streets, alleys, public places and commons for the purpose of removing the bodies of all dead animals from its streets, alleys, etc., in consideration of his agreement to promptly remove such dead bodies and properly inter them on his own premises before creating a nuisance, and to save harmless the city from any liability on account of any nuisance. Before the expiration of the five years the city, without any cause of complaint, capriciously tired of its contract, and proposed to sell to the highest bidder the privilege it had already granted to another for a valuable consideration. Held—That the city was properly enjoined from selling the privilege.

2. A city having granted to an individual the exclusive privilege of hauling out of the city along its streets the bodies of dead animals, others can

not be allowed to buy up such dead bodies and haul them out along the streets, although the original owners have the privilege of thus removing them.

Appeal in first case from Louisville Chancery Court.

Appeal in second case from Louisville Law and Equity Court.

Opinion of the court by Judge Bennett.

By agreement these two appeals, the first from the Louisville Chancery Court, and the second from the Louisville Law and Equity Court, are to be heard together. We will dispose of them by one opinion, in the order in which they stand.

The appellees allege in their petition that on the 22d of November, 1883, they made a contract in writing with the appellant, the city of Louisville, by which appellees agreed to promptly remove from the streets, public and private, public places and commons and uninclosed lots in said city, the carcasses of all dead animals, free of cost, expense or liability whatever of said city or the owners of such animals, and properly inter them on their own premises before creating a nuisance; and to save harmless the city from any liability on account of any nuisance. In consideration whereof the city granted to appellees the exclusive right to the use of its public streets, etc., to remove the carcasses of all dead animals from the public and private streets, alleys, public places and commons of said city for the term of one year, with the privilege to appellees to continue said contract for five years; that by equipping themselves, at large expense, with horses, wagons and machinery, they have complied with the terms of said contract to the letter; that at the expiration of the first year of their term; they availed themselves of the privilege granted to them in said contract, and renewed it with the city for five years; that before the expiration of their contract with the city it, in disregard of appellees' right under said contract, proposed to let out and sell to the highest bidder the privileges of appellees under said contract. They asked for and obtained an injunction restraining appellant from letting or selling said privilege to the highest bidder.

The appellant filed a motion in the lower court to dissolve the injunction, also a demurrer to the petition, and both having been overruled by the court, and the appellant declining

to plead further, the injunction was perpetuated, from which judgment the appellant appeals to this court.

It is contended in behalf of appellant that as the removal of dead animal carcasses from the city, and the disposal of them, is one of the police powers of the city, necessary to be exercised at all times to preserve the public health, comfort and cleanliness of the city, she has no legal power to limit or surrender her control by contract over that subject or kindred ones beyond her recall at pleasure.

The State has never surrendered its power, sometimes called its police power, but more properly its sovereign power, by which it controls, through its municipalities and other agencies, within certain limits, everything within its territorial limits relating to the welfare of its people. In the exercise of that power it creates and controls educational and charitable institutions, and provides for the establishment of public highways, canals, wharves, ferries, and also the public health, public morals, and public safety, and almost numberless other things.

These powers she has and exercises in absolute right, except as limited by the Federal Constitution, or by her own fundamental law.

She may also, in the exercise of her powers, grant "exclusive, separate, public privileges in consideration of public services."

She may also grant special or private privileges to certain individuals, provided the rights of others are not affected by it.

She has the right to confer upon cities and towns, as integral parts of the State, the exercise of such of these powers as may be deemed necessary, prudent or expedient for their local welfare and comfort. She may also grant many exclusive privileges to persons and corporations; also relinquish many of her powers. She may also recall them at pleasure, except where the person to whom the grant is made proposes to render a public service in consideration thereof; or in case of the grant of a special private privilege, the person to whom the grant is made proposes, in consideration thereof, to engage in some enterprise that he would not or could not have otherwise

done, then such grants of privileges, public and private, become contracts for a sufficient consideration, and can not be impaired by any subsequent act of the State.

The power to protect, through her cities and towns and other public agencies, the public health, the public morals and the public safety, can not be relinquished or surrendered, for the government is bottomed upon the fundamental principle of the promotion of the peace, safety, happiness and security of its citizens. Therefore, any surrender of its power to protect the public health, the public morals, the public peace, the public safety of the citizen, would violate this fundamental principle and tend to revolution and anarchy. The power, therefore, can not be surrendered.

The State, however, and its municipalities, intrusted with the execution of this power, may provide the means of protecting the public health. It is its duty to do so, and any means may be adopted that will effect the end, such as employing competent and trusty persons to take the matter in charge under the supervision and control of the State or city.

Here the appellant did not surrender her right to the control of the public health of the city in the removal of dead animal carcasses. She exercised that right, as her admissions show, in an efficient and prudent manner. She contracted with appellee, for a sufficient consideration, that he, for the period of five years, should have the exclusive privilege of performing that duty for her and on her behalf. This he did faithfully and efficiently. There existed no cause of complaint on the part of the city. Appellee kept the city promptly cleared of carcasses, and no nuisance was allowed to accrue from them. But the city, without just cause or any cause of complaint, capriciously tired of its contract and proposed to break it. This she could not do. If appellee had failed to comply with his contract, then the city would have had the right, by ordinance, to recall it. Or if it became necessary in the exercise of the reasonable judgment of the city to establish new regulations for the removal of carcasses, for the purpose of more

effectively preventing a nuisance arising from them; she had the right to require the appellee to carry them out under his contract: Provided, however, such new regulations were not inconsistent with his essential rights under the contract. Or if it became necessary to recall the contract in toto, in order to prevent a nuisance arising from carcasses in the city, then the city had the right to recall it. These powers are inherent in the city, upon the fundamental principle of necessity and consequent duty of protecting the public health of its citizens, to which it is the duty of its employes to yield. But to allow the city to disregard or recall its contract with its contractors or employes engaged to service by fixed terms, upon its mere caprice, or to gain a pecuniary advantage, would be the exercise of an arbitrary power that does not exist in the land.

In the case of Wible & Willinger v. J. C. Struss & Co. the record shows that appellees were in the habit of buying the carcasses of dead animals in the city from their owners, and hauling them out of the city along its streets, and using them for their own benefit. The appellants complain of this as a violation of their exclusive contract rights with the city. The appellees contend that as the owners of these dead animal carcasses have the right to haul them out of the city along its streets, they have the right to purchase the carcasses for their own benefit from the owners, and haul them out of the city along its streets also.

The privilege of the owners of dead animal carcasses to haul them out of the city along its streets is a personal privilege, which can not be transferred to others, in view of the city ordinance, as a general business enterprise.

Also for a person to buy up all the dead animal carcasses in the city from their owners, and then claim the right to haul them out of the city along its streets, upon the pretense that they belonged to him, would be a clear evasion of the city ordinance

Also, the appellants having contracted with the city to remove all the carcasses of dead animals in the city, and keep the city free of any nuisance arising therefrom, to allow appellees to exercise the right to haul them out along the streets and control them would not only violate the appellee's exclusive privileges under his contract with the city, which the city had the right to make, but might make him responsible in damages to the city on account of any nuisance arising from the dead animal carcasses hauled and controlled by appellees on account of any unskillful or negligent conduct of theirs.

We are of the opinion, for the foregoing reasons, that the lower court in the case of *Wible & Willinger v. The City of Louisville*, did right in perpetuating the injunction against the city.

We think, in the case of *Wible & Willinger v. J. C. Struss & Co.*, that the lower court erred in modifying the injunction against *J. C. Struss & Co.*, so as to allow them to haul the carcasses along the streets which they had purchased from others.

Wherefore, the judgment of the Louisville Chancery Court is affirmed, and the judgment of the Louisville Law and Equity Court is reversed in so far as it modified *Wible & Willinger's* injunction against *J. C. Struss & Co.*, with directions to perpetuate said injunction according to the prayer of the petition.

T. L. Burnett, J. F. Bullitt & Son and Kohn & Barker for City of Louisville.

Young & Trabue and O'Neal, Jackson & Phelps for *Wible & Willinger*.

RUSSELL, &c. v. DOYLE, &c.

(Filed October 23, 1886.)

Champerty—Sale to co-tenant—A sale by one tenant in common to his co-tenant of his undivided interest in land, which is held adversely, is not champertous. The reason for the statute prohibiting the sale of lands held adversely ceases in such a case, and hence the law itself must cease.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Holt.

Neither of the parties to this action of ejectment have any legal paper title to the land in contest. The patent to Isaac Rucker, through whom the appellees claim title, was issued in 1838; while the warrant of Sullivant, through whom the appellants claim, was laid in 1875. Both were void because the land had been patented to Thomas Clay in 1799.

The special verdict finds, however, that the heirs of Rucker had a possessory title to the land when the Sullivant entry was made in 1873, and the only question presented by this appeal is whether they are barred of a recovery by champerty. The lower court declined to submit this question to the jury, and the appellants claim that this was error, because it appears that two of the heirs sold their undivided interest in the lands of their ancestor to a third one. One of these sales was made in 1875, and the other in 1879, and when made the land was adversely held. It is questionable whether the sales had not been rescinded before this suit was brought; but waiving this question, the inquiry is presented whether a sale by one tenant in common to his cotenant of his undivided interest in land, which is held adversely, is champertous.

Chapter 11 of the General Statutes provides: "All sales or conveyances, including those made under execution, of any lands, or the pretended right or title to the same, of which any other person, at the time of such sale, contract or conveyance, has adverse possession, shall be null and void. * * * Neither party to any contract made in violation of the provisions of this chapter shall have any right of action or suit thereon."

It is urged that inasmuch as, at common law, a tenant in common holds by unity of possession, and has a several freehold, that if he sells his interest in land which is adversely held to his cotenant, it is champertous, and bars a recovery

by the purchaser. In our opinion, however, the law of champerty does not apply to such a case.

The existence of the English statute upon the subject is traceable to several reasons. Among them is the prevention of the sale of pretended titles, whereby litigation is encouraged; also the protection of the weak from the oppression of the rich and powerful with doubtful claims. Its creation is probably attributable more, however, to the exigency attending the time of enactment, and consequent upon sudden revolution, accompanied with a change of title of perhaps a considerable portion of the property of the kingdom. Those thus acquiring power and property would naturally desire to place every possible barrier in the way of a claim by the former owner, or by one claiming through him.

In our country, however, no such reason has existed. Nor under a government like ours, where caste does not exist and titled name does not in itself confer power, is it necessary to enact a law for the benefit of the weak as against the strong. The reason for its enactment with us is to prevent litigation, and the purchase of doubtful claims by strangers to them. If the owner is not disposed to attempt the enforcement of a doubtful claim, public policy requires that he should not be allowed to transfer it to another party, and thus encourage strife and litigation. It has, therefore, been deemed beneficial to the public interest to prohibit it; and time has manifested that it works no injury to the honest man, while it may, and in fact does often, interfere with the interests of keen-sighted speculators, and prevent a practice of purchasing doubtful titles. This, then, being clearly the object of the statute, does it apply to a transfer by one tenant in common or co-owner of his undivided interest to his co-tenant? In such a case no stranger to the title is introduced, but one who is already interested, and who may sue for the property, merely increases his interest.

Here the reason for the rule fails, and hence it fails. The champerty law was intended to apply to the purchase by a stranger of property adversely held, as this would be productive

of litigation; and the law should not receive a strained construction, and one reaching beyond the reason for its enactment, in a country where the alienation of estates is favored.

We have been unable to find any case similar in its facts to the one before us. By analogy, however, the court has spoken upon the question. Formerly, at common law, the sale of choses in action was prohibited as champertous, upon the ground that otherwise litigation would be encouraged, and the oppression of the weak and ignorant fostered by transfer into the hands of the more powerful. In the case of *Blackerby v. Holton, &c.*, 5 Dana, 520, it was said that the rule would not apply where a part owner of a chose in action transferred his interest to the co-owner, because the undivided interests of both became thus united in the one, which certainly was not conducive to litigation, if indeed it did not tend to its prevention.

Our conclusion is that the reason for the existence of the statute requires the construction above indicated.

Judgment affirmed.

J. W. Bush, John K. Hendrick and J. C. Hodge for appellants.

Dan B. Cassidy and R. W. Wake for appellees.

WILLIAMSBURG BOOM CO. v. SMITH.

(Filed October 21, 1886.)

1. Water courses—Rights of riparian owners—It is the common law rule, which has been adopted in this State, that the right of owners of land binding upon tidal waters extends only to ordinary high water mark, and that the bed beyond it belongs to the sovereign or State for the use of the public; but grants of land upon navigable streams above tide water vest the right to the soil to the thread or the center of the stream in the grantee, unless the terms of the grant clearly show an intention to stop at the margin of the river, subject, however, to the right of the public to use it as a highway, and the proprietor has a right to use the banks and water in any way not inconsistent with the public easement.

A patent appropriating the bed of a river was void, the same land being embraced by prior patents to land on each side of the river calling for the

river and its meanders, thereby vesting in each grantee the right to the soil under the water on his side of the river to its thread or center.

2. Even if the land of the riparian owner extends only to low water mark, yet if he has a mill upon the stream he may appropriate the bank for the purpose of receiving logs, and may construct a log way or other structure extending into the river for the purpose of facilitating their removal, and thus appropriate a portion of it, provided he does not interfere with the easement of the public; and if he permits another to do so there is no ground for complaint.

3. In this action by appellee to prevent the use or occupation by appellant of the river in controversy the evidence is not sufficient to support the finding of the jury that the plaintiff had been in the adverse possession of the bed of the river for more than fifteen years.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Holt.

It is the rule of the common law that the right of land owners, binding upon tidal waters, extends only to ordinary high water mark, and that the bed beyond it belongs to the sovereign or State for the use of the public; but grants of land upon navigable rivers above tide water vest the right to the soil *ad filum aquæ* in the grantee unless the terms of the grant clearly show an intention to stop at the margin of the river, subject, however, to the right of the public to use it as a highway; and the proprietor has a right to use the banks and water in any way not inconsistent with the public easement.

The courts of most of the States, as well as the Supreme Court of the United States, have followed this rule, and it has been adopted in this State. (*Berry v. Snyder, &c.*, 3 Bush, 266.)

The patent to Charles Gatliff, upon the north side of the Cumberland river, for 100 acres, issued in 1801, and that of James Gatliff, for 125 acres, opposite to it upon the south bank, dated November 24, 1815, each call for the river and its meanders; and thereby the right to the soil under the water (conceding that public policy did not forbid its appropriation) vested in each grantee upon his side of the river to its thread or center, subject of course to the public easement in it as a highway.

The patent to Andrew Craig of 1837 appropriated the bed of the river only, save a small portion of V shaped land running

back from it at one point, and which is not in contest; and, to the extent that this patent conflicted with the two above named it is void, because it embraces land previously patented.

The appellee, John Smith, claiming under it, brought this action of ejectment against the Williamsburg Boom Co. to recover the bed of the river between two certain points; and between which the Charles Gatliff patent called for the meanders of the river upon the north side, and the James Gatliff patent upon the south side. It appears that the boom company have leased from the present owners of the Charles Gatliff land the banks along it to low water mark, they supposing that they owned only to that point, and not to the thread of the river because of the Andrew Craig patent; and that it has erected upon that side of the river large log booms, to secure the logs which come down the river until they can be manufactured into lumber by the Cumberland River Lumber Co., its mills being located upon the opposite side of the river, and it being a large stockholder in the boom company. These booms are not fastened to the bottom of the river. They are moveable structures, made of logs, and held in place by ropes or "sheers" fastened to them and to the north bank of the river.

The "sheers" are moveable, made of logs, and answer as ropes both to secure the booms to the adjoining bank and also to keep them the proper distance from it. It appears that some of them have been taken across the river and fastened to the opposite bank, and then attached by ropes to the booms upon the other side of the river, thus aiding to keep them in proper place; but these sheers are moved about as occasion may require.

Upon the south side of the river, and opposite to the booms, the Cumberland River Lumber Co. have "pockets" for holding the logs after they are brought from the booms until they can be manufactured into lumber.

■ This action was brought to prevent the use or occupation by means of these booms and sheers by the boom company. Prior

to its institution the appellee, Smith, had become the owner of the James Gatliff land upon the south side of the river, or at least of that portion of it lying opposite to the booms, and had sold it to several parties; but when this action was brought the Cumberland River Lumber Co. was the owner or in control of all of it. The deeds from Smith, with perhaps one exception, called for low water mark.

The owners of the Charles Gatliff land do not appear to have done anything which defeats their right to the soil to the center of the river. It is true that they supposed this right extended only to low water mark, owing to the existence of the Craig patent; but the evidence shows that they always claimed all that they were entitled to under their grant. We find, therefore, that the appellee, Smith, is suing for the bed of the river under a void patent, and for land which belongs upon the one side of the river, and to its thread, to those who hold under the Charles Gatliff patent, and upon the other side, while the bed of the river to its center is covered by the James Gatliff patent, and which the appellee acquired, that yet he had, before the bringing of his action, parted with the land, at least to low water mark, thereby vesting in the vendees, if not the right to the center of the river, at least the control of the bank, subject of course to the easement of the public in a navigable stream.

The jury, by a special verdict, found that the appellee and those under whom he claimed had been in the actual possession for more than fifteen years of the entire bed of the river; that those holding under the Charles Gatliff patent had claimed only to the margin of the river; that the portion of the river covered by the Craig patent was called for in the two Gatliff patents; that those holding under the Charles Gatliff patent had been in possession for sixty years; and that the appellant did, at the bringing of this suit, have possession of a portion of the river on the south side of the center of it, but this possession was opposite the river front which the appellee had conveyed away.

It is manifest that there was no testimony whatever to support the finding that the appellee had been in the actual possession for fifteen years of the entire river bed.

He had no valid title whatever to the north half of it. If constructively in possession of the entire bed by claim of it, yet the Charles Gatliff title was elder and superior to any such claim.

As to the north side of the river the title, subject to the right of the public in it as a highway, was in the owners under the Charles Gatliff patent; and they had leased the banks upon that side of the river to the appellant for the purpose of fastening its booms to them and storing its logs against their land; and beyond question the appellee had no right of recovery as to that side of the river.

Upon the other side he had sold the land at least to low water mark. The right to land under water extending from the shore towards the center of the stream has always been held to be appurtenant to the shore; but even if the grants from the appellee did not pass such right, yet his vendees certainly became entitled to all the riparian rights which by law attach to the owner whose lands bind upon a navigable stream, and the "sheers" that are upon that side are in front of the land thus acquired by the Cumberland River Lumber Co. Even if the land of the riparian owner extends only to low water mark, yet if he has a mill upon it he may appropriate the bank for the purpose of receiving logs, and may construct a log way or other structure extending into the river for the purpose of facilitating their removal, and thus appropriate a portion of it, provided he does not interfere with the easement of the public; and if he permits another to do so there is no ground of complaint. The "sheers" upon that side of the river were as moveable as boats; they were not permanent structures, and the findings of the jury that the appellee had been in the actual possession of the entire bed of the river for fifteen years prior to the bringing of the suit, and that the boom company were in possession of a portion of the river

upon the south side of the center of it, were not sustained by any evidence in this case.

As to the south side of the river the boom company was, at most, only exercising a riparian right by the consent of the owner of the adjoining bank; and the appellee, after selling land to the lumber company for milling purposes, should not be allowed to defeat the use in the way he has attempted.

Judgment reversed and cause remanded for a new trial consistent with this opinion.

W. Lindsay for appellants.

C. W. Lester and Hargis & Eastin for appellee.

C., O. & S. W. R. R. CO. v. REASOR, &c.

(Filed October 21, 1886.)

1. Judgments—Jurisdiction to enjoin proceedings—An injunction to prevent the sale of property under execution can not be granted except by the court which rendered the judgment upon which the execution issued. Section 285 of the Code is not confined in its application to cases where the validity of the judgment is attacked.

2. As the court which rendered a judgment alone has jurisdiction to enjoin proceedings on it, the circuit court has no jurisdiction to enjoin proceedings on a judgment rendered in the court of a justice of the peace.

Appeal from Meade Circuit Court.

Opinion of the court by Judge Lewis.

The C., O. & S. W. Railroad Co. instituted this action in the Meade Circuit Court to enjoin the defendants, Wooldridge, who had recovered against it in the court of a justice of the peace of that county judgment for \$9.50, and Reasor, a constable, who had levied an execution issued thereon upon certain personal property of the plaintiff, from any further proceeding, or from seizing, removing, selling, or in any manner interfering with the possession or use of the property. And the circuit court having sustained a demurrer to its jurisdiction, dismissed the action and dissolved the temporary

injunction. The plaintiff appealed to the Superior Court, and thence to this court.

It seems to us there is no room for doubt as to the intended application or meaning of section 285 of the Civil Code, which is as follows: "An injunction to stay proceedings on a judgment shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered."

In *Kelly v. Kelly*, 2 Duvall, 363, it was held that, notwithstanding the note on which the judgment was rendered was given for land, and the equitable ground of want of title in the vendor existed for suspending the coercion of the judgment, nevertheless it could be enjoined by no other than the quarterly court in which the judgment was rendered.

In *Davis v. Davis*, 10 Bush, 274, it was held that section 314 of the former Code, identical with section 285 quoted, applied to courts of justices of the peace, and circuit courts had no power to enjoin proceedings on their judgments.

In *Nuter v. Clements*, 12 Bush, 358, it was held that even when, under section 846 of the former, which is similar to section 723 of the present Code, an execution had been issued by the clerk of the circuit court on a judgment of a quarterly court and levied on real estate, the circuit court had no jurisdiction to enjoin such execution, the power to do so being alone in the court that rendered the judgment. And it was so decided at the present term of this court in *McConnell v. Rowe*, 8 Ky. Law Rep., 343, where the same question was presented.

But it is argued that the relief sought in this action does not involve an attack on the judgment of the justice of the peace, nor denial of the right of the plaintiff therein to have it enforced, the object being simply to set aside the particular levy on property not subject to execution, and to prevent a sale in virtue of it. Nevertheless the effect of the injunction would be to indirectly invalidate the judgment, and to some extent impair its efficacy. But as the mode by which a judgment may be vacated, reversed or modified is elsewhere in the Code

provided, the inhibition contained in section 285 was manifestly intended, as its terms apply not to the judgment itself but to proceedings thereon.

The injunction authorized by the Code is, as defined in section 271, "a command to refrain from a particular act." And it seems to us clear that whatever ministerial act is provided or authorized by law to be done to coerce payment or satisfaction of a judgment is, in the meaning of section 285, a proceeding on the judgment. For if the issuance of the execution and the levy and sale of property to satisfy it are not, we are at a loss to say what are the proceedings on the judgment referred to. And if another than the court which has rendered a judgment may command an officer to refrain from the act of levying an execution issued on it, or from the act of making sale of the property, it may as well enjoin the issuance of the execution, or any other proceeding necessary to the enforcement of the judgment.

In our opinion the demurrer to the jurisdiction of the court was properly sustained, and the judgment is affirmed, with damages.

H. Cummins and P. H. Darby for appellant.

C. C. Fairleigh for appellees.

BOGENSCHUTZ v. SMITH.

(Filed October 9, 1886.)

1. Master and servant — Negligence — Dangerous premises — Pleading—

If a servant knows that the material or machinery furnished him for work is defective and unsafe, or that the premises where he labors are dangerous, and he, without complaint or promise from the master of a change, continues to use them, he must be deemed to have waived any claim against the master for injury therefrom; therefore, in an action by a servant against his master to recover damages for personal injury caused by the defective state of machinery or premises or materials provided by the master for the purposes of the work, it is necessary for the plaintiff to allege and prove that the danger or defect was known to the defendant, and not known to the plaintiff. The servant, however, is not bound in all cases to inform himself as to the safety of the premises or material to be used, as the master

may have superior means of knowledge, and the circumstances may authorize the servant to rely on him because of want of equal opportunity.

2. In an action by a servant against his master for negligence in arranging a certain part of the machinery provided for the work in such a way as to be dangerous, it was error to submit to the jury the question whether another part of the machinery furnished by the master was defective in construction, that question not being in issue under the pleadings.

3. It was error to submit to the jury the question whether through "want of care" upon the part of the defendant the materials furnished the plaintiff for his work were defective in preparation, without defining the degree of care that should have been exercised.

4. A pleading is to be construed most strongly against the pleader.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

The alleged negligence of the employer toward the employe is in this instance confined by the petition to the alleged obstruction of the gangway in the foundry of the appellant, along which the appellee, as a moulder in his employ, together with the other workmen, carried molten iron in ladles from the cupola, as it is called, to the moulding floors. It is claimed that certain vessels for holding iron were along or upon the margin of the gangway, and that they or the handles to them extended into it some two or three feet, it being from six to ten feet wide, and that the passage of the workmen with their ladles filled with iron was thereby rendered quite dangerous.

The appellee had worked in the foundry for the appellant for about four years, and it appears from the testimony offered by the former that the gangway had been obstructed, more or less, for a long time. It is not alleged in the petition that its condition was unknown to the appellee.

It is well settled that when one enters upon an employment he assumes all the risk ordinarily attendant upon it. If it be necessarily attended with danger, the servant undertakes to exercise ordinary care upon his part to avoid it.

The master must use ordinary care in providing proper and safe premises as well as proper machinery and material for the servant, but if from any cause it be not so, and the latter is

fully aware of it, and without complaint or assurance to him from the master that it shall be remedied, he voluntarily continues the use of them, then he waives his right, in case of injury, to hold the master responsible, and is without remedy, *volenti non fit injuria*. Thus where the master knew that a scaffold was defective and rotten, over which his servant was passing in his work, not knowing of the danger, the former was held liable for the latter's injury, as occurring through the master's negligence. (*Roberts v. Smith, &c.*, 2 Hurl. & N., 218.)

Also where the employer knew that a ladder leading to his granary was defective and unsafe, and yet ordered his servant, who was ignorant of its condition, to carry corn up it, he was held responsible for an injury to the servant resulting from the defect in the ladder. (*Williams v. Clough*, 3 Hurl. & N., 259.)

Sherman & Redfield on Negligence, section 94, says: "It is obvious, however, that an employer may relieve himself of all common law liability for accidents occurring to his servants through defects in materials, or in the character of fellow servants, by giving explicit warning of such defects, and notice that he does not intend to remedy them. For servants remaining after such a warning must be deemed to assume the risk for themselves, as much as if it were one of the ordinary risks of the business. The courts have gone further than this, and hold that if a servant knows that a fellow servant is habitually negligent, or that the number of servants employed is insufficient, or that the materials with which he works are defective, and continues his work, without being induced by his master to believe that a change will be made and without plainly objecting, he is deemed to have assumed the risk of such defects."

In Wood on Master and Servant, page 791, we find this language:

"The servant, in order to recover for defects in the appliances of the business, is called upon to establish three propositions:

"1st. That the appliance was defective.

"2d. That the master had notice thereof, or knowledge, or ought to have had.

"3d. That the servant did not know of the defect, and had not equal means of knowing with the master."

Thompson on Negligence, volume 2, page 1008, says:

"If the servant before he enters the service knows, or if he afterward discovers, or if by the exercise of ordinary observation or reasonable skill and diligence in his department of service he may discover that the building, premises, machine, appliance or fellow servant, in connection with which or with whom he is to labor, is unsafe or unfit in any particular, and if, notwithstanding such knowledge or means of knowledge, he voluntarily enters into or continues in the employment without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him. * * * It may be stated, as a general proposition, that the master is under no higher duty to provide for the safety of the servant than the servant is to provide for his own safety. It follows that if the knowledge or the ignorance of the master and that of the servant in respect of the character of the machine are equal, so that both are either without fault or in equal fault, the servant can not recover damages of the master."

While the law imposes a duty upon the master, a correlative one is also upon the servant. He can not continue, without objection, to use a machine or premises known to him to be dangerous at the risk of the master.

This rule is well settled in England.

In the late case of *Griffiths v. The London, &c., Docks Co.*, decided by the English Court of Appeals on June 24, 1884, it was held that, in an action by a servant against his master to recover damages for personal injury caused by the defective state of machinery or premises or materials provided by the master for the purposes of the work, it is necessary, in order that the plaintiff may succeed, to prove that the danger or de-

fect which caused the injury was known to the defendant, and was not known to the plaintiff, and that a statement of claim which does not allege both these facts discloses no cause of action, and is insufficient.

In this country it is not only supported by the text writers, but by the decisions of courts of high authority, and has been adopted by this court.

Laning v. Railroad Co., 49 N. Y., 521; McGatrick v. Mason, 4 Ohio State, 566; Mud River, &c., R. Co. v. Barber, 5 Ohio State, 541; Buzzell v. Laconia M. Co., 48 Me., 113; Railroad Co. v. Doyle, 49 Texas, 190; Sullivan's Adm'r v. Louisville Bridge Co., 9 Bush, 81.

We do not mean to decide that there may not be cases where the servant has a right to rely upon the judgment of the master as to the safety of the premises or material to be used, or that the servant is bound to inform himself as to them.

Thus it is in general no part of the duty of a brakeman to inspect the track of a railway or to know that it has been safely constructed. The master may have superior means of knowledge, and the circumstances may authorize the servant to rely on him because of want of equal opportunity. The servant may be ignorant without fault while the master is negligently so. The law to be applied to a case must, therefore, depend upon the facts shown; but generally, if a servant knows that the material or machinery furnished him for work is defective and unsafe, or that the premises where he labors are dangerous, and he, without complaint or promise from the master of a change, continues to use them, he must be deemed to have waived any claim against the master for injury therefrom.

The petition in this case is somewhat indefinite. It does not clearly appear whether the pleader intended to allege that the injury resulted from the act of a fellow laborer caused by the neglect of the master in not providing safe and proper premises, or simply that the injury was caused by the alleged improper obstruction of the gangway. Construing it, as we must, most strongly against the pleader, the latter construc-

tion must be adopted; and it was essential to the sufficient statement of the alleged cause of action, that it should have been stated that the alleged defective condition of the gangway was unknown to the appellee.

This defect in the petition was not cured by the answer or the verdict. The averment of a want of knowledge was essential to the statement of a cause of action. It is true contributory neglect was pleaded as a defense, but it is purely a matter of defense and can not supply an allegation essential to the statement of a cause of action. As to one the burden of proof is on the plaintiff, while as to the other it is on the defendant. A verdict may cure an ambiguity in pleading, but does not avail if there be an omission to allege a matter which is material to make out a cause of action.

The following were the first, second and fourth instructions given to the jury:

"The court instructs the jury that if they believe from all the evidence in this case that at the time the plaintiff was burned the gangway in defendant's foundry was obstructed by ladles, or other utensils, so as to be rendered too narrow for the safe passage of plaintiff and other piece workmen in the employ of defendant, and if they believe from the evidence that the defendant or his superintendent, or cupola boss, or workmen under charge and direction of defendant, his superintendent caused said gangway to be so obstructed; or if said defendant, his superintendent, or cupola boss knew that said gangway was so obstructed and permitted the same to remain; or if, by the use of the reasonable skill and diligence of an ordinarily prudent person, could have known that said gangway was so obstructed, and that defendant, his superintendent, or cupola boss could have known of said obstruction in said gangway, said defendant, his superintendent or cupola boss permitted the same to remain in or upon said gangway, and that because of said obstructions in said gangway the plaintiff was burned without contributory negligence on his part, as defined in instruction No. 6, then the jury must find for the plaintiff such com-

pensatory damages as they shall from all the evidence find he has sustained, not exceeding the sum of \$12,500, the amount claimed in the petition.

“If the jury believe from all the evidence that the plaintiff was, at the time mentioned in the petition, working for the defendant in his foundry, and that while so working for the defendant at piece work he was injured by molten iron poured upon him from the ladle of another hand also working for defendant; and if they further find that the ladles so used by said hands so working by the piece for defendant were prepared and delivered to said workmen by the defendant, his superintendent, or cupola boss, and that said ladles were not properly prepared for such use by said superintendent or boss, by want of care of the latter, or from a defect in the drying apparatus unknown to the plaintiff; and that the gangway prepared by defendant or his superintendent, over which the men so working for defendant ordinarily passed with their ladles filled with molten iron, was obstructed or permitted to be obstructed by the defendant, his superintendent, or other boss or day hands in defendant's employ and under his direction, so that same was left in a condition too narrow for workmen to safely pass with ladles filled with molten iron; and that while so passing along said gangway, and because said ladles were not properly prepared for use, and because said gangway was so obstructed, the plaintiff while in the exercise of such care as a man of ordinary prudence would use under the circumstances, the ladle of the plaintiff and another workman collided, and the molten iron from one of said ladles was thereby poured upon plaintiff's leg and foot, and he was injured by the molten iron being so poured upon his leg and foot, the jury must find for the plaintiff such damages as he has suffered therefrom, not exceeding the sum of \$12,500.

“If the jury believe from the evidence in this case that the injury to plaintiff was caused by or resulted from gross negligence on the part of defendant, his superintendent, or cupola boss, in the management of defendant's foundry and in ob-

structing said gangway, or permitting it to remain obstructed after they knew or could, by the exercise of ordinary care and prudence, have known that the same was obstructed, and too narrow for the safe passage of plaintiff and the piece workmen in defendant's employ, as set out in instruction No. 1, then the jury may, in addition to the compensatory damages mentioned in said instruction No. 1, find for plaintiff punitive damages not exceeding in all the said sum of \$12,500, the amount claimed in the petition."

The defect in the petition already pointed out was carried into the first instruction. It improperly failed to incorporate the idea or to submit to the jury the question whether the obstruction in the gangway was known or unknown to the appellee.

The second instruction is objectionable in several respects. It allowed the jury to consider whether the ladles in which the iron was carried were defective in construction or whether the apparatus for drying them was sufficient when these matters were under the pleadings not in issue. It submitted to them whether, through "want of care" upon the part of the appellant, the ladles were not defective, without defining the degree of care to be exercised by the appellant in their preparation. The jury were left to determine whether he was bound to use extraordinary or only ordinary care as to them and the drying apparatus; also leaving out of view the question whether, if defective, he could, by the exercise of ordinary care, have discovered it. It, moreover, also ignored the question of knowledge of the condition of the gangway upon the part of the appellee.

No instruction as to the fitness of the ladles or drying apparatus should have been given for the same reason that rendered it improper to submit to the jury in the fourth instruction the question whether the injury resulted from gross negligence "in the management of defendant's foundry." These matters were not in issue by the pleadings, and the last-named instruction appears to have improperly assumed that the obstruction

of the gangway, whether much or little, constituted gross negligence.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Stevenson & Goebel and R. Richardson for appellant.

J. F. & C. H. Fisk for appellee.

HUMPHREY'S EX'OR v. WADE.

(Filed October 28, 1886.)

1. Deputies—Execution levy—The mere failure of a deputy sheriff to sign the name of his principal to an execution levy does not render the levy void. Proof may be introduced to establish the validity of the levy, or the return may be amended to conform to the facts.

An execution issued from the circuit clerk's office in the usual form and was placed in the hands of the sheriff, who, in person, endorsed upon it the time of its reaching his hands; it was then returned with a levy and return of "no sale for want of bidders" endorsed upon it by one who added to his signature the letters "D. S." A venditioni exponas was then issued and came to the hands of the sheriff, who sold the property upon which the execution had been levied. Held—That the levy was valid, and that no further evidence was necessary to establish the fact that the person who signed the levy was the deputy of the sheriff to whose hands the execution came, and who sold the property under the venditioni.

2. The levy of an execution upon the interest of the defendant in a particular tract of land is not void because it fails to specify the nature or extent of his interest.

3. The rule of caveat emptor applies to judicial sales, therefore, after the report of sale has been confirmed the purchaser can not be relieved from the payment of the purchase money because there is a defect or want of title.

In this case, however, as the plaintiff, by his own act, produced this litigation in which he has assumed the burden of showing title in the defendant for the protection of the purchaser at the decretal sale, and thus involved the rights of the purchaser that perhaps would not otherwise have been disturbed, the court adjudges that he shall be held to show title before proceeding against the purchaser for the purchase money.

4. Partition—Where, in the partition of realty among heirs, the interest of one of the heirs was allotted and conveyed to his wife, one who had previously acquired a lien upon the husband's interest was not affected thereby, and the purchaser under a proceeding by him to enforce his lien can not complain of the title because the deed was made to the wife instead of the husband.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

John Humphrey, in October, 1871, had an execution issued on a replevin bond in his name against one William E. Wade and his surety. The execution came to the hands of the sheriff of Kenton county in a few days after it issued, as appears by the endorsement of the sheriff in person, in the following words:

"Came to hand October 24, 1871, at 9 o'clock, a. m.

"J. J. MACKLIN, S. K. C."

In November, 1871, while the execution was in full force, it was levied by the deputy of the sheriff "on the interest of Wm. E. Wade in a certain lot of ground situated on the east side of Scott street, between Fifth and Sixth streets, at south-east corner of an alley running from Scott to Greenup streets; thence south with Scott street sixty-five feet, more or less. Also the interest of said Wade in the property bounded by Scott, Sixth, Greenup and Seventh streets; and having duly advertised the same, I did, on the 16th of December, 1871, offer the property for sale, but same was not sold for want of bidders.

(Signed) "W. F. GILLESPIE, D. S."

Macklin, the principal sheriff, after this levy, in January, 1872, sold the property, by virtue of the levy made by his deputy, under a venditioni exponas, and the plaintiff, Humphrey, became the purchaser.

After the purchase by Humphrey of Wade's interest in this property the former filed a petition in equity in which his purchase is set forth, and further alleging that at the time the sale was made there was a proceeding pending to divide said property among the heirs and devisees of one Lemaise, and those holding under them, and that in the allotment Wade, the defendant in the execution, had been given a lot of fifty-six feet on Greenup street, by 190 feet deep, beginning on the north side of Seventh street; that having purchased Wade's interest in the entire property, he asks the chancellor to have

that portion allotted to Wade conveyed to him (Humphrey) or subjected to his debt.

To this action Wade was a defendant, and the court adjudged Humphrey a lien for his debt, and directed a sale of the lot for its payment.

Mrs. Wade, the wife of the debtor, became the purchaser, and executed sale bonds with the present appellee, J. S. Scott, as her surety. This sale, although confirmed, seems to have been set aside for the reason, as is stated, that the married woman was not liable upon her bonds. When this was done a subsequent sale was ordered, a more particular description of the property given, and the sale bonds made to bear interest for one year at 10 per cent. The lot was again sold, and J. S. Scott, who was the surety of the wife at the former purchase, became the purchaser, and the sale was confirmed. Wade, the debtor, then brought the case to this court complaining of the interest allowed, among other errors assigned, and the judgment was reversed because of the excess of interest.

Scott was not before the court on the appeal, nor was his purchase in any manner disturbed. On the return of the cause the appellant filed an amended petition asserting his claim to the property, and claiming 10 per cent. interest on his debt. He makes Wade a defendant to the amended pleading, who, for the first time, sets up title in his wife to the property purchased by Scott, and alleges that, in the division of the realty between the heirs of Lemaise, this lot, his wife being one of the heirs, was assigned to her, and a deed made by the commissioner, and further denies that he ever surrendered the land for sale under the original execution. So far as the debtor, Wade, was concerned the court below, as well as this court, had already adjudged that the plaintiff in the execution was entitled to enforce his lien on this particular lot of ground, and he had no defense to interpose except to reduce the interest from 10 to 6 per cent. The wife, however, was made a party to the action, and she is asserting claim to the lot in controversy by reason of the conveyance to her in the division

of the realty between Lemaise's heirs, and also by a purchase made of the property under an execution against her husband in favor of the Covington City National Bank.

The execution in favor of the bank was junior in date to that of the appellant, and, therefore, the sale under it passed no title, if the sale made by the sheriff under appellant's execution was valid.

The appellant claims that the execution debtor, Wade, purchased the interest of Frederick Lemaise under the foreclosure of a mortgage made to the Cincinnati & Chicago Railroad Co., and that this lot in controversy was assigned to the husband, and the wife's deed is of no validity. If by the mistake of the commissioner or by the fraud of the wife, the deed was made to the latter, when it should have been made to the husband, facts alleged by the appellant, then the wife's title is unavailing as against the claim of the appellant.

Mrs. Wade is insisting, however, that she has title under her purchase at the execution sale in favor of the bank, and that the levy of the original execution in favor of the appellant is void upon several grounds:

1st. That the property levied on is not sufficiently described, or the defendant's interest therein.

2d. That the levy endorsed on the original execution signed by W. F. Gillespie, D. S., is not a levy by either the sheriff or his deputy, and to make it effectual it should be signed in the name of the sheriff by his deputy, naming him, or by the deputy, naming him, for the sheriff, naming him.

The law, it is true, regards the sheriff and his deputy as one and the same officer, and the general and correct rule for the guidance of the deputy in his official action, such as returning and serving process, is to sign the name and official character of the principal by himself as deputy.

Both the Revised and General Statutes (the 10th section of chapter 100, General Statutes) provide, in reference to returns made by a sheriff of his official action, that "he shall subscribe

his own name to the return, and, if he be deputy, the name also of his principal."

This provision of the statute, while defining the duties of the sheriff and prescribing the mode of affixing the signatures of the principal or his deputy, does not render, either in express terms or by inference, the act of the deputy void in the event he fails to discharge this duty in the manner pointed out.

The office of deputy sheriff is one known and recognized by the law, although his official action is that of his principal, and in that sense there is but the one sheriff, and what is done by the deputy is the act of the principal, and it is proper that the return by the deputy should conform to the statute.

A deputy, by reason of his appointment, is empowered to discharge all the official duties imposed on the sheriff. He is not like an ordinary agent, restricted to the exercise of the power conferred by the principal, but assumes, when qualified as such, to discharge every duty that belongs to his official character or that of the sheriff, unless prohibited by statute.

Section 678 of the Civil Code provides "that any duty enjoined by this Code upon a ministerial officer, and any act permitted to be done by him, may be performed by his lawful deputy." In the case of *Norman v. Norman*, 6 Bush, 495, the act of the deputy marshal, whose signature was affixed without the name of his principal, was held to be valid. The marshal of the Louisville Chancery Court possesses the same qualifications of a sheriff, with the right to appoint deputies with the approval of the chancellor, and, therefore, under the provisions of the Code, where the sheriff is required often to make returns on executions in his hands, by reason of its provisions, the return by the deputy, in his own name as deputy, must be regarded as sufficient; and to hold that his signature as deputy alone would be valid under the Code and invalid under the statute would produce an inconsistency not easily reconciled by any decision that might be rendered. On the validity of the action of a deputy sheriff the citizen must often depend for the security of both his person and property, and, there-

fore, no technical construction of a statute as to the mere manner of exercising his duties should be adhered to or established. If he does act in his official capacity no harm can result from such a ruling; and if not, he is responsible for the wrong. It is insisted, however, that there is no evidence before us that Gillespie was the deputy of Macklin. The execution issued in the usual form from the clerk's office of Kenton county, was signed by the clerk, and the time of its reaching the hands of the sheriff was endorsed on the execution by that official in person. The levy was then made in a proper manner and the execution returned no sale for want of bidders, signed, W. F. Gillespie, D. S., and then a venditioni issued that came to the hands of Sheriff Macklin, and by him the property levied on by W. F. Gillespie, D. S., was sold.

It is true, if the levy was void, the venditioni gave no new authority to the sheriff, but in the absence of proof to the contrary the execution, the endorsement by the sheriff, the return for want of bidders, and the venditioni and sale under it must be held as evidence satisfactory in its character that Gillespie, at the time he made the levy and return, was the deputy sheriff of Macklin, the sheriff of Kenton county.

This court will not presume, upon such a state of facts, that some one had usurped the powers of the sheriff and was levying on the estate of the defendant without any authority, but, on the contrary, must assume that the act of Gillespie was that of a regularly constituted deputy in the discharge of duties vested in him by law. In the absence of any statute forbidding such a ruling it must be held that a mere failure of the deputy to sign the name of his principal does not render the act of the deputy void; and that proof may be introduced or the return amended to conform to the facts where the validity of his official action in this regard is brought in question. The deputy is not living, but, in our opinion, the evidence in the record is sufficient to establish a valid levy. In the case of *Scott v. Marshall*, 5 J. J. Marshall, 433, a defense was made by the sureties in a recognizance on the ground that it did not

appear that Anderson, before whom it was taken, was the deputy clerk of the Franklin Circuit Court. The statute then provided (in 1820) that the defendant may appear before the clerk of the court and enter into a reconveyance. It appeared in that case that the bond was signed and acknowledged in the presence of Cuth S. Anderson, deputy clerk. No objection was made that the name of the principal clerk was not subscribed, but that there was an absence of evidence that Anderson was a deputy.

The court held that they must presume he was the deputy until the contrary was made to appear. A breach of duty on the part of a sheriff may make him personally responsible, and still his acts as to third parties, or those affected by it, would not be held void; and when the deputy may perform every duty that his principal can, and does in fact discharge that duty, to hold that such a return as was made in this case is void, or that the evidence is insufficient to show that Gillespie, when he signed the paper, was in the discharge of an official act, it seems to us would be depriving the party of the right of property upon mere technical grounds.

Authorities are not wanting sustaining the view of the chancellor below, but the entire authority in this State is adverse to such a ruling.

No such question as the one now presented was made on the former appeal, and as to the debtor, Wade, the question must be regarded as already adjudicated.

The land levied on is sufficiently described, or that which has already been subjected to the payment of the appellant's debt, and the right, title and interest of the defendant may be levied on and sold without specifying the particular interest. Such a levy is certainly not void.

A rule was obtained by the appellant against the purchaser, Scott, during the progress of this litigation to pay the purchase money, and the defense relied on was the want of title. The sale had been made and the report of sale confirmed. No fraud was alleged by Scott as against the appellant, and relief

is asked only on the ground of a want of title in the debtor. This constitutes no defense. There was no warranty of title by the chancellor, and we are aware of no case where, after confirmation, such relief will be granted on the ground that there was a defect of title or a want of title.

The purchaser buys at his peril as in ordinary sales under execution, the only difference being that in sales by the chancellor, through his commissioner, the purchaser will often be relieved from his purchase before the sale is confirmed by reason of a defective title. (Harrison v. Hord, 12 B. Monroe, 471; Dawson v. Litsey, 10 Bush, 408; Yocum v. Foreman, 14 Bush, 494; Farmers Bank v. Peter, 13 Bush, 591; Philips v. Johnson, 14 B. Monroe, 140; Boyd v. Longworth, 11 Ohio, 235.) The rule of caveat emptor as to such sales is now so well recognized as not to require any authority in support of it.

In this case, however, upon the return of the cause from this court to the court below, the appellant seems to have waived his right to proceed against the purchaser for the time being, and by an amended pleading proceeded to litigate the question of title with Wade, or the right to subject the lot assigned Wade to the payment of his debt. From this amended petition has originated the present litigation involving the question of title, and as the appellant has voluntarily assumed the burden of showing title in Wade for the protection of the purchaser at the decretal sale, upon the idea, doubtless, that it was his duty to do so, we are inclined to adjudge that he shall be held to show title before proceeding against Scott, the purchaser. His own act not only invited but produced, the litigation, and thus involved the rights of the purchaser that would not, perhaps, have been disturbed but for the action of the appellant in further prosecuting his claim against the property of the debtor, when it had already been subjected to its payment.

It seems to us that the only issue to be determined by the court below in the present condition of the record is, was the lot in controversy upon which the lien was enforced the prop-

erty of the husband or the wife? If it was the wife's realty, and allotted to her in the partition as her part of the estate, of course she is invested with title, having obtained the deed from the commissioner. If, on the other hand, the conveyance was improperly made to her and should have been made to the husband, or to the purchaser of his interest, then there is no reason why Scott should not pay the purchase money. (Scott v. Marshall, 5 J. J. Marshall, 483; Norman v. Norman, 6 Bush, 495; Lofland v. Ewing, 5 Littell, 42; Moore v. Farrow, 3 A. K. Marshall, 41; Winslow v. Austin, 5 J. J. Marshall, 408.)

The judgment below is reversed that this issue may be disposed of and for further proceedings consistent with this opinion.

Benton & Benton for appellant.

Collins & Fenley for appellee.

DUPOYSTER v. GAGONI.

(Filed October 28, 1886.)

1. Wills—Probate of copies from foreign courts—The simple judgment of a foreign court of probate admitting a will to probate is sufficient to authorize an authenticated copy of the will, accompanied with the certificate of probate, to be admitted to probate in this State as a will of personalty; but in order to authorize an authenticated copy of such a will to be admitted to probate here as a will of real estate, it must appear from the transcript of the proceedings and judgment of the foreign court, not only that the will was admitted to probate in that court, but that the evidence heard there was sufficient to authorize our courts of probate to admit the will to record had it been offered originally in our courts.

2. When the order of our probate court states how the authenticated copy of the foreign will is admitted to probate, whether as a will of personalty or of realty, or of both, it will probably be conclusive as to that fact until superseded, reversed or annulled; but where the order of our court admits the copy to probate as a will without defining whether it was admitted as a will of realty or of personalty, then if the evidence contained in the transcript of the proceedings and judgment of the foreign court was sufficient to authorize the probate of the original will under our laws, the presumption is that the copy was admitted to probate by our courts as a will of both

real and personal estate; otherwise, the presumption is that the copy was admitted by our court of probate as a will of personalty only.

In this case the copy of the foreign will having been admitted to record by our court of probate without defining whether as a will of realty or of personalty, the presumption is that it was admitted as a will of both, the evidence of two witnesses contained in the transcript and judgment of the foreign court, showing conclusively that the will was wholly written in the handwriting of the testator.

3. A holographic will could be admitted to probate under the Revised Statutes upon the proof of only one witness that it was in the handwriting of the testator.

4. Evidence—Pedigree—To authorize the proof by third persons of the declarations of others as to the relationship of a certain person to another it must appear that the declarant is dead, and that he was related to the person in question by blood or marriage; and any person who heard such declarations, whether related or not, may prove them, if otherwise competent as a witness. If, however, the relationship is attempted to be proved by general repute in the family and not by the declarations of its deceased members, the proof can be made alone by the surviving members of the family.

5. Identity of devisee—In this contest between appellants and appellee as to whether appellee was a certain person named as devisee in a will, the declaration of the other devisees in the will that appellee was the person named was mere hearsay and incompetent, the contest not being between appellee and the other devisees.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Bennett.

The appellee brought an action of ejectment against the appellant in the Ballard Common Pleas Court to recover the possession of a tract of land to which she claims title as one of the devisees of Baker Woodruff, to whom said land was granted by the Commonwealth of Kentucky; and which land was, by a deed of partition between her and S. Badger and others, as her co-devisees under said will, set apart to her.

On behalf of the appellee the patent from the Commonwealth to Baker Woodruff, the copy of his will, together with the several certificates of the probate thereof and the deed of partition, were read to the jury. Appellant did not object to the reading of the patent and deed of partition, but did object

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to the reading of the copy of the will to the jury, which objection was overruled by the court, and the appellant excepted.

After the appellee closed her evidence the court instructed the jury in substance to find for her. To the giving of the instruction the appellant excepted. The jury having found for the appellee, the appellant moved for a new trial upon the grounds, first, that the court erred in permitting the copy of the will to be read to the jury; and, second, in permitting incompetent evidence to go to the jury; and, third, in instructing the jury to find for the appellee.

It appears from the record before us that Baker Woodruff, in the spring of 1857, died in the parish of St. Bernard, State of Louisiana, leaving a holographic last will and testament, which was duly probated in the district court of the St. Bernard parish upon the proof of Thomas King and E. L. Lunisco that they were well acquainted with the handwriting of Baker Woodruff, from having frequently seen him write and sign his name in his lifetime, and that said paper, offered as his last will, was wholly in his handwriting.

On the 7th of March, 1860, a copy of said will, accompanied by a full transcript of the proceedings of the St. Bernard District Court, showing the foregoing facts, was produced in the Ballard County Court, and the will was then admitted to probate. To the transcript was attached the certificate of the clerk of the St. Bernard District Court, in due form; also the certificate of the judge of said court that the clerk's certificate was in due form.

Section 31 of chapter 106 of the Revised Statutes, in force when the will was admitted to probate in Ballard county, reads as follows:

“When a will of a nonresident of this State, relative to estate within this State, has been proved without the same, an authenticated copy thereof, and the certificate of probate thereof, may be offered for probate in this State. When such copy is so offered the court to which it is offered shall presume, in the absence of evidence to the contrary, that the will

was duly executed and admitted to probate as a will of personalty in the State or county of the testator's domicile; and shall admit such copy to probate as a will of personalty in this State. And if it appears from such copy that the will was proved in the foreign court of probate to have been so executed as to be a valid will of lands in this State, by the laws thereof, such copy may be admitted to probate as a will of real estate."

Under the statute supra the simple judgment and order of a foreign court of probate admitting a will to probate is sufficient to authorize an authenticated copy of such will, accompanied with the certificate of probate, to be admitted to probate in this State as a will of personalty. The evidence upon which such will was probated in the foreign court need not appear. If the record and judgment of the foreign court of probate admitting such will to probate fail to show evidence to the contrary, our courts of probate must presume that the evidence before the foreign court of probate was sufficient, and admit the authenticated copy of such will to probate as a will of personalty.

On the other hand, in order to entitle an authenticated copy of such will to be admitted to probate here as a will of real estate, it must appear from the transcript of the proceedings and judgment of the foreign court of probate not only that such will was admitted to probate in the said court, but that the evidence heard there was sufficient to authorize our courts of probate to admit such will to record, had the same been offered originally in our courts of probate for probate.

When the evidence contained in the transcript of the proceedings and judgment of the foreign court of probate is shown to be sufficient to authorize the probate court of this State to probate said authenticated copy as will, as though the will itself had been offered for probate, without reference to the simple judgment of the foreign court of probate, then said court may admit such copy as a will of real estate; so when such authenticated copy of a foreign will is presented to a probate court of this State for probation, it may be admitted to

probate according to the facts appearing in the transcript as a will of personalty, or as a will of realty, or as a will of both; and when the order thus admitting the copy to probate as a will does so show, it will probably be conclusive until superseded, reversed or annulled. Also the order of the court may admit such copy to probate as a will in general terms—without defining whether it was admitted as a will of realty or of personalty—such was the order of the county court of Ballard in the case before us.

When the copy of such will is thus admitted to probate as a will, in the absence of evidence contained in the certified transcript of the proceedings and judgment of the foreign court of probate sufficient to authorize the probate of the original will here under our laws, the presumption is that it, the authenticated copy, was admitted by our courts of probate as a will of personalty only.

On the other hand, if the evidence contained in the transcript of the proceedings and judgment of the foreign court of probate was sufficient to authorize the probate of the original will here under our laws, then the presumption is that such copy was admitted to probate by our courts as a will of both real and personal estate.

Here the evidence of two witnesses, contained in the transcript of the proceedings and judgment of the foreign court of probate, shows conclusively that the will was wholly written in the handwriting of Baker Woodruff, the testator, which was sufficient to admit said will to probate under our laws. Indeed, under section 5, chapter 106 of the Revised Statutes, in force at the time said copy was admitted to probate by the Ballard County Court, a holographic will might be admitted to probate by the proof of only one witness. Besides, this court so held in the case of *Baker v. Dobyns, &c.*, 4 Dana, 221.

We conclude, therefore, that the court below did right in overruling the objection of appellant to the reading of the copy of said will to the jury as evidence.

The appellee undertook, in the court below to prove her

identity as the Mrs. Henderson named in the will of Baker Woodruff, now Mrs. Gagoni, by N. P. Moss, who swore that he had known George S. Badger and his wife, Jane D. Chitwood and Mary A. Gagoni for about fifteen years, and that from the family history, derived from these parties, he knew that Mrs. Henderson, named in the will of Baker Woodruff, was the Mrs. Gagoni, the appellee.

Mr. Greenleaf in the 1st volume, section 103 of his work on Evidence, says: "But the rule is now settled that the law resorts to hearsay evidence in cases of pedigree, upon the ground of the interest of the declarants in the person from whom the descent is made out, and their subsequent interest in knowing the connections of the family. The rule of admission is, therefore, restricted to the declarations of deceased persons who were related by blood or marriage to the person, and, therefore, interested in the succession in question; and general repute in the family, proved by a surviving member of it, has been considered as falling within the rule."

It is only in the instance that the declarant is dead, and was related to the person in question by blood or marriage, that his declarations as to the relationship, and the degree of it, of such person can be proved by third persons; and any person, whether related or not, if otherwise competent as a witness, who heard such declarations may prove them.

If, however, such relationship is attempted to be proved by the general repute in the family, and not by the declarations of its deceased members, then the proof must be confined to the surviving members of it.

If the declarant is not dead, then it is not competent to prove his declarations, because he can himself testify to the fact, which is the best testimony.

The record does not show that these declarants were dead, nor that they were related to the appellee by blood or marriage, nor that they were related to the devisor. They were all, as far as the record shows, competent to swear to the fact in ques-

tion, and if their evidence was desired they should have been introduced as witnesses, in person or by depositions. Besides, the appellee was herself a competent witness to prove the fact.

She was not introduced at all.

In this contest between appellant and appellee, wherein it was denied that the appellee was the devisee under the will of Baker Woodruff, the fact attempted to be established by the witness was that he heard these persons, who claimed to be devisees under said will, say that appellee was the person named as one of the devisees in said will. The evidence was clearly incompetent.

Had the contest been between the appellee and those persons as to whether she was the person named in said will as one of the devisees, then she could have introduced their declarations of the fact as original evidence against them. But to allow such declarations to go to the jury to establish that fact, in a contest between her and a third person, clearly violates all the rules of evidence.

For the foregoing error the case is reversed and remanded, with directions to grant a new trial and for other proceedings consistent with this opinion.

J. M. Bigger for appellant.

J. M. Nichols for appellee.

WILLETT v. JOHNSON, &c.

JOHNSON v. FINZER, &c.

(Filed November 6, 1886.)

1. Liens—Rights of junior lien holders—A contract between mortgagor and mortgagee extending the time of payment of the mortgage debts and providing for the compounding of interest can not be enforced so as to prejudice junior lien holders, whose liens were created prior to the making of the new contract.

2. Judicial sales—Directions as to terms of sale—In directing the sale of several tracts of land separately, which will probably command different prices, it is error to direct that a certain part of the entire purchase price be paid in cash without apportioning it, it being impossible for the officer to

announce beforehand what proportion of the cash payment each purchaser will be required to pay.

3. Judicial sales—Cash payments—The authority given by section 827 of the Code to the Louisville Chancery Court to direct a sale of real property for cash was doubtless intended to apply to property within the limits of the city, and not to property in agricultural communities. But whether so or not it was error for that court to require a cash payment of so large an amount as \$2,000 in directing the sale of land used for agricultural purposes.

4. Judicial sales—Reasonable credit—The amount to be raised by the sale of several tracts of land being about \$20,000, a sale for \$2,000 cash, the residue of the purchase money to be paid in six and twelve months, was not a sale on a reasonable credit within the meaning of the Code, considering that those who might be expected to bid were farmers.

Appeals from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

May 19, 1876, J. S. Willett executed to Isabella G. Johnson his individual note for \$8,000 borrowed money, payable three years thereafter, and bearing interest from maturity at the rate of 9 per cent. per annum. He, with John Finzer & Brothers, his sureties, at the same time executed to her six other notes for \$360 each, which respectively fell due during the three years as the semi-annual installments of interest at the same rate on the principal sum for which they were given accrued.

To secure the payment of the seven notes Willett executed to her a mortgage of that date on three tracts of land, containing 125½, 136 and 44 acres, in which it was stipulated that if John Finzer & Brothers were compelled to pay any of the six interest notes for which they were bound as sureties, they were, to the extent of such payment, to be substituted to her rights, subject, however, to her superior lien.

August 8, 1877, Willett borrowed of John Finzer & Brothers \$5,230, for which he gave them his note, bearing interest at the rate of 8 per cent. per annum from date until paid, and payable in twenty-two months; and to secure the payment of

the note he executed to them a mortgage on the same three tracts of land.

This action was instituted August 28, 1882, by Mrs. Johnson to recover judgment on the note for \$8,000, and for other sums hereafter mentioned, and to subject the mortgaged property to the payment.

In her petition she states that at the maturity of the principal note May 19, 1879, she agreed with Willett to extend the time for its payment three years further, and to reduce the rate of interest thereon to $7\frac{1}{2}$ per cent. per annum, payable semi-annually, which agreement is evidenced by a writing in Willett's possession and also by an endorsement on the back of the note.

She further states that all the installments of interest payable under that agreement, each of which was \$300, had, when the action was commenced, been paid by Willett, except the one which was due May 19, 1882; and that he then owed her the principal sum of \$8,000, and interest thereon at $7\frac{1}{2}$ per cent., payable semi-annually from May 19, 1882, until paid, and the \$300 mentioned, with interest at the rate of 6 per cent. from the same date.

John Finzer & Brothers being made defendants, filed their answer and cross petition against Willett, in which they aver they paid off the six notes for \$300 each as they fell due, and asked judgment for the amount, and 6 per cent. interest from the time of such payments; and also for the \$5,220 loaned to him, with 8 per cent. interest, and for a sale of the three tracts of land to pay their debts.

April 27, 1883, the chancellor rendered personal judgment by default in favor of the plaintiff, Johnson, against the defendant, Willett, for \$8,000, and interest thereon at $7\frac{1}{2}$ per cent., payable semi-annually from November 19, 1882, until paid, the semi-annual installments to bear interest at 6 per cent. from the dates they severally fall due until paid; and for the further sum of \$300, being the installment which became due November 19, 1882, together with 6 per cent. interest from

that date. But the installment of \$300 mentioned, which fell due May 19, 1882, was paid after the action was commenced, and no judgment was rendered therefor.

November 8, 1883, personal judgment, by default, was rendered in favor of John Finzer & Brothers for the several debts set up in their cross petition. And it was at the same time adjudged that they held a lien on the three tracts of land for the satisfaction of their debts, which, however, was inferior to the lien of the plaintiff, Johnson, "save as to interest on said several sums of \$300 coming to her as aforesaid, for which interest her said lien is inferior to that of said cross plaintiffs."

To pay the several sums mentioned the marshal of the court was, by that judgment, directed to sell publicly to the highest bidder so much of the land as might be necessary, the several tracts to be separately sold in the order they are enumerated and described in the judgment.

It was further directed in the judgment that of the purchase money \$2,000 should be paid in cash on the day of sale; and for equal parts of the remainder the marshal was required to take from the purchaser or purchasers bonds, payable in six and twelve months, bearing interest for so much of the plaintiffs' and cross plaintiffs' debts as bear interest at 6 per cent. at that rate; for so much of the plaintiffs' debt as bears 7 and $7\frac{1}{2}$ per cent. at that rate, and for so much of the debt of cross plaintiffs as bears 8 per cent. at that rate.

From that judgment both the plaintiff, Mrs. Johnson, and defendant Willett, appeal.

The ground upon which the plaintiff seeks a reversal is that the chancellor decided that no part of the proceeds of the mortgaged property should be applied to pay interest accrued or accruing on the several sums of \$300, being semi-annual installments of interest on the principal debt, until all the debts mentioned of John Finzer & Brothers are satisfied.

In the personal judgment rendered in her favor April 27, 1883, it is distinctly recited that the action was retained for subsequent hearing on the cross petition of John Finzer &

Brothers, and as to the matter of the enforcement of the liens of the plaintiff and cross plaintiffs; consequently the chancellor was not precluded by that judgment from subsequently determining the question of priority of liens.

The note for \$8,000, when executed May 19, 1876, contained no promise by Willett to pay semi-annual installments of interest after it fell due May 19, 1879. It is true the six notes for \$360 each were given for the semi-annual interest at the rate of 9 per cent. per annum that was to accrue between the date and maturity of the principal note. But those notes were executed by Finzer Brothers with a knowledge of the contract between Mrs. Johnson and Willett, as it then stood, and upon the faith that she would enforce her lien to satisfy the debt with reasonable diligence, or at least that she would not, by a new contract with Willett, place it out of her power to sue for three years after the note matured.

While the contract for an extension of the time of payment was binding on the parties to it, it was a change of not merely the form, but the substance of the original contract. And being so, it should not be enforced so as to lessen the security the Finzer Brothers had for the payment of their debts before it was made, or in any way prejudice their rights.

It is no answer to this proposition to say that the rate of interest was reduced by the new contract from 9 to $7\frac{1}{2}$ per cent.

For the amount of interest already collected by her under that contract, during the three years' extension, amounts to a great deal more than interest at 9 per cent. would have been if the principal debt had been duly sued on when it fell due. This, however, is not simply a question of gain or loss to the junior lien holders, but it is whether the proceeds of the mortgage property shall be first applied to pay compound interest, which Mrs. Johnson claims the right to recover in virtue solely of a contract that did not exist when the junior mortgagees acquired their liens, and to which contract they are strangers.

In our opinion the chancellor properly gave preference to

the debts of cross plaintiffs over the claim of the plaintiffs for interest on interest.

No question is raised as to the plaintiffs' priority in respect to the interest on the note for \$8,000, accrued subsequent to May 19, 1882, and it is, therefore, not proper to consider it.

The judgment for a sale of the property will have to be reversed on the appeal of Willett.

It seems to us impracticable for the marshal to sell the property according to the directions of the chancellor. For, as the three tracts of land are required to be sold separately, and differing in quantity, must probably, if not certainly, command different prices, it will be impossible for the marshal to determine or announce to bidders beforehand what proportion of the \$2,000 each purchaser, if there should be more than one, will be required to pay in cash; and whether the three tracts be purchased by one, or by three persons, the uncertainty as to the amount to be paid in cash will be calculated to deter bidding to the injury of the debtor, even if a purchaser under such circumstances could be held to his bid.

Section 827, Civil Code, which relates to sales of property under judgments of the Louisville Chancery Court, is as follows: "Sales of property shall be for cash, or on reasonable credit, or for part cash and part on reasonable credit; but a sale of personal property shall not be on a longer credit than four months."

By that section the terms of a sale of real property is left to the discretion of the chancellor; and this court should not, of course, assume that discretion has been unreasonably exercised, or reverse unless satisfied the sale, if made in pursuance of the judgment, will injure the creditor or oppress the debtor.

Section 496 of the Code, which is applicable to courts of the State generally, expressly provides that every sale made under an order of the court must be upon reasonable credits, to be fixed by the court, not less than six months for real property.

The exceptional authority given by section 827 to the Louisville Chancery Court to direct a sale of real property for cash was doubtless intended to be exercised in cases of property

being within the limits of the city of Louisville, where the nature of business and the manner of doing it require more promptness, and the means of meeting money transactions are more accessible than is the case in agricultural communities. But whatever may be the extent of authority given to the Louisville Chancery Court, or the object in conferring it, common experience teaches us that to require a cash payment of \$2,000 under a judicial sale of land used for agricultural purposes would ordinarily deter men from bidding who might be anxious to purchase the land offered for sale, and able to pay for it if given a reasonable time to prepare for doing so.

Moreover, considering the amount of money to be raised by the sale of the three tracts of land, upwards of \$20,000, and that those who may be expected to bid at the sale will be farmers, purchasing the land for agricultural purposes, we think to require the residue of the purchase money paid in six and twelve months is not a sale on reasonable credit in the meaning of the Civil Code, because it would, in our opinion, result in an unnecessary sacrifice of the property.

We think the chancellor erred in requiring any part of the purchase price of the land to be paid in cash on the day of sale, and in not giving a longer time for the payment of the balance, for we are satisfied that, as a general rule, a judicial sale of land used for agricultural purposes, as is the case of the three tracts here, can not be made, except upon reasonable credits, without injury to the debtor and often to the creditor.

Wherefore, the judgment is affirmed on the appeal of Isabella G. Johnson and on the appeal of Willett it is reversed and the cause remanded for further proceedings consistent with this opinion.

Sterling B. Toney, Baker & Atchison and Elliott & Hemin-
gray for Johnson.

Muir & Heyman and R. W. Woolley for Willett.

DORSEY, &c. v. PHILLIPS, &c.

(Filed November 9, 1886.)

Fraudulent conveyances—Limitation—A statute of limitation which bars the right to recover property, or to subject it to the payment of the grantor's debts by an action, perfects the holder's right to it, and, therefore, protects it from sale by execution to satisfy such debts.

Where persons entitled under the statute to have a conveyance set aside, either as actually or constructively fraudulent, allow ten years to elapse from the execution of the conveyance without taking any action the right of the grantee as against them is perfected, and they can neither bring an action to set aside the conveyance nor have an execution levied on the land as that of the grantor.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellants, in 1857, brought suit against Thomas L. Phillips, as administrator of Samuel Phillips, and his sureties, Murray Phillips being one of the sureties, to recover judgment for a large sum of money which they alleged was due them by Thomas L. Phillips as administrator of Samuel Phillips. The alleged claim was contested by the administrator and his sureties until the 18th of November, 1876, when judgment was rendered in favor of the appellants for sums aggregating over \$10,000.

On the 12th of December, 1878, execution was issued on said judgment against Murray Phillips, &c., which was thereafter returned "no property found."

On the 8th of February, 1861, Murray Phillips conveyed, by deed duly recorded, his home farm, containing 367 acres, to John A. Shraeder in trust for the sole use and benefit of his (Murray Phillips') wife and children.

On the 21st of January, 1879, the appellants brought suit against Murray Phillips, his wife and children, and John A. Shraeder, as trustee (the present appellees), to set aside said conveyance, and subject said land to the payment of said debt, upon the ground that the conveyance was voluntary, without any valuable consideration, and, therefore, void. The appellees in their answer did not deny that the conveyance was

voluntary, but relied upon the statutory period of ten years' limitation in bar of appellants' right of action.

The lower court, not regarding that plea as a sufficient defense, rendered judgment in favor of appellants, subjecting the land to the payment of said debt. From that judgment appellees appealed to this court.

This court, at its September term, 1883, held that the statutory period of ten years' limitation completely barred appellants' right of action to subject said land to the payment of said debt, and reversed the judgment of the lower court, and directed the dismissal of appellants' petition absolutely.

(Phillips, &c. v. Shipp, &c., 81 Ky., 436.)

After the dismissal of appellants' petition by the lower court, pursuant to the opinion of this court, they caused an execution to be issued upon their judgment, and levied upon the said tract of land as the property of Murray Phillips. The appellees, Shraeder, &c., filed their petition in equity against appellants, in which they allege substantially the foregoing facts, and that said land belonged to them, and was not subject to appellants' execution. They obtained a temporary injunction enjoining the sale of said land. On the final trial of the cause the lower court held that the land was not subject to said execution, and perpetuated the injunction. From that judgment appellants have appealed to this court.

The appellants contend that "the provision of the statute of limitation which prohibits an action to be brought for relief from a fraud after ten years from the perpetration of the fraud does not prohibit the levy of an execution. To levy an execution is not to bring an action."

"The fact that the creditor has brought an action in equity upon a return of no property to subject said farm to the satisfaction of his debt, and that the court has dismissed said action because not brought within ten years, does not bar the right of the creditor to afterward levy an execution on said farm."

Section 1 of article 1, chapter 44 of the General Statutes, provides that "every gift, conveyance, * * * or transfer of

* * * any estate, real or personal, * * * made with the intent to delay, hinder or defraud creditors, purchasers or other persons, * * * shall be void as against such creditors, purchasers and other persons."

The second section of the same article and chapter also provides that "every gift, conveyance, * * or transfer * * by a debtor * * of any of his estate, without valuable consideration therefor, shall be void as to all of his then existing liabilities, but shall not, on that account alone, be void as to creditors whose debts or demands are thereafter created."

The first section of the statute supra relates to gifts and conveyances, which are made with the design in fact to "delay, hinder or defraud creditors, purchasers or other persons," and declares that such gifts or conveyances, etc., "as against such creditors, purchasers or other persons," shall be "void." The statute does not declare such gifts and conveyances void for any and all purposes, but only as against creditors, purchasers or other persons who may be delayed, hindered or defrauded, are such gifts, conveyances, etc., declared void. As between the grantor and the grantee such gifts or conveyances are valid. Also such gifts or conveyances are valid as against all persons who do not come within the category mentioned in the section of the statute supra.

Also the gifts or conveyances, etc., mentioned in the second section of the statute, not only as between the parties thereto, but as against all persons except those named in the statute, are valid. As against the rights of such excepted persons only the gifts or conveyances are void.

Section 2 of article 3, chapter 71 of the General Statutes, provides that "an action for relief on the ground of fraud or mistake * * shall be commenced within five years next after the cause of action accrued."

Section 6 of article 4, same chapter, provides that "in actions for relief for fraud or mistake * * the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten

years after the time of making the contract or the perpetration of the fraud."

These two sections relate to the same character of fraud or mistake. They define each other. The second section provides that for fraud or mistake the action shall be commenced within five years next after the cause of action accrued.

The sixth section provides that the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake. Therefore, the action may be brought within five years from the time of the discovery of the fraud or mistake, and is not limited to five years from the time of the perpetration of the fraud or mistake. The sixth section, while thus defining section 2, provides that no such action shall be brought ten years after the time of making the contract or the perpetration of the fraud.

The statute of ten years' limitation runs not from the time of the discovery of the fraud, nor from the time the right of action first accrued, but from the time of making the contract or the perpetration of the fraud.

The gifts and conveyances mentioned in section 1 of article 1, chapter 44 of the General Statutes, are declared actually fraudulent by this court. Also the gifts or conveyances mentioned in the second section *supra* are declared constructively fraudulent by this court; and that the statute of ten years' limitation bars any right of action to set aside the conveyances, etc., made in contravention of either section of the statute. (*Phillips v. Shipp, &c., supra.*)

As we have before said, as the gifts or conveyances mentioned in the two sections of the statute *supra* are valid not only as between the parties, but as against all persons except those mentioned in said sections, whose rights are affected by such gifts or conveyances, it follows that if such persons delay to bring their action to set aside such gifts or conveyances for ten years after they are made, then the statute bars the right to disturb them in toto.

The right or title acquired by such gift or conveyance being

perfect as against all persons except those mentioned in the statute, the lapse of ten years from the time of such gift or conveyance without action closes out their right, and makes such gift or conveyance perfect as against them.

While the legislature intended, by sections 1 and 2, chapter 44 of the General Statutes, that neither the fraudulent nor voluntary gift or conveyance therein named should affect the rights of any of the persons therein mentioned, it also intended by section 6, chapter 71, that after the lapse of ten years from the time of such gift or conveyance without action the fraud, whether actual or constructive, should be condoned, and the donee's or vendee's right should, from that time forward, be valid as against all the world.

The statutes of limitation of this State bar not only the legal remedy, but the legal right also; whenever the legal remedy is destroyed the legal right is also destroyed. "The very idea of a legal right is, that it is one which may be enforced by law. The legal right and the legal remedy are, therefore, correlative. The former implies the existence of the latter, and the latter implies the existence of the former. Neither can exist without the other."

It is also well settled that the statutes of limitation of this State that bar the right to recover the possession of property, or to subject it to the payment of a debt, also perfect the title in the person of the claimant. (Stanley v. Earl, 5 Litt., 282; McCracken County v. Mercantile Trust Co., 8 Ky. Law Rep., 814.)

In the case before us the appellees received a conveyance to the land in controversy in 1861. That the conveyance was either actually or constructively fraudulent as against appellants, there can be no doubt. In either case, however, the statute of limitation provides that no action shall be brought to set aside the conveyance and subject the property to appellants' debt, on account of such fraud, after the lapse of ten years from the time of such conveyance. If this statute means anything, it means that the nonaction of ten years on the part of

the appellants validated and perfected the appellees' right to said land under said conveyance as against them and all others similarly concerned in setting the conveyance aside, and who failed to take action within the ten years.

Nor does this statute require any adverse holding of the property conveyed in order to perfect the right of the vendee as against the persons whose rights are affected by the conveyance; it is sufficient if the holding is consistent with the right conveyed, as in this case. The fact that the persons whose rights are affected by the conveyance delay to bring their action within the time fixed by the statute is what bars their right and perfects the vendee's title as against them.

It is true that the judgment plaintiff may have execution issued on his judgment at any time within fifteen years after the judgment was rendered, and cause it to be levied on any property belonging to the defendant at the time; but it is not true that the plaintiff can have property levied on and sold which the defendant had conveyed to another, though fraudulently, long enough for the statute of limitation to bar the plaintiffs' right to subject the property by action to the satisfaction of his judgment. Suppose the defendant, after judgment was obtained against him, should fraudulently sell his horse to a third person, and that person should hold the possession of the horse for ten years before the execution was issued, would it be contended that the execution could be levied on the horse as the property of the defendant? Or suppose that a third person should wrongfully take the possession of the defendant's horse after judgment had been rendered, and hold the horse as his own for five years before execution was issued, would it be contended that the horse could be levied on as the property of the defendant? Would the plaintiff in the execution be allowed to say it is true that the horse has been held long enough to bar an action for its recovery; it could not be subjected to the satisfaction of the judgment by an action; time has barred that, but an execution is not an action. The statute reads that an action shall be barred, not an execution. The fallacy of the argument is exposed when it is

remembered that the statute of limitation which bars the right to recover property, or to subject it to the payment of debts by an action, perfects the holder's right to it, and, therefore, protects it from sale by execution to satisfy such debts. For the foregoing reasons the judgment of the lower court is affirmed.

Brown, Humphrey & Davie for appellants.

P. B. Muir and W. W. Thum for appellees.

WILLIS v. McNEAL'S ADM'R.

(Filed March 13, 1879.)

1. Appeals to circuit court—Amendment of pleading—While a plaintiff can not upon an appeal to the circuit court amend his pleadings so as to set up a new and independent cause of action the defendant has a right to make all the defenses he has, and the court may allow the defense to be changed or new defenses to be made as if the case had been originally brought in that court.

2. Costs of appeal—Upon appeal to the circuit court, the plaintiff having no cause of action, was properly adjudged to pay the cost of both courts.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Cofer.

A plaintiff can not upon an appeal amend his pleadings so as to set up a new and independent cause of action. The case, i. e., the cause of action, to be tried on the appeal must be the same that was tried in the lower court. But to that case the defendant has a right to make all the defenses he has. If he fails to set up any defense, and allows judgment to go by default, it is within the discretion of the court in which the appeal is pending for a trial de novo to allow an answer to be filed. So, too, that court may, in the same way, allow the defense to be changed, or new defenses to be made, as if the case had been originally brought in that court. Every existing defense to a cause of action must be made before final trial or it will be lost entirely. If any valid defense exists the defendant has a right to set it up at any time, unless he has waived the right or lost it by his laches. In this case the circuit judge, in the exercise of his discretion, allowed the amended

answer to be filed, and on the suggestion of the plaintiff that he was not ready to proceed with the trial continued the case at the defendant's cost. This seems to us to be all that justice or law demanded.

The evidence was conflicting, and this court can not reverse on the ground that the preponderance may be against the appellee.

The appellant having had no subsisting cause of action against the appellee was properly adjudged to pay the costs in both courts.

Judgment affirmed.

Strother & Orr for appellant.

H. P. Montgomery and Jos. Blackwell for appellees.

KENTUCKY SUPERIOR COURT.

WALKER v. HODGE.

(Filed October 13, 1886.)

Limitation—Sale bonds—The cause of action upon a sale bond made payable to the plaintiff in the action accrues upon the maturity of the bond, although the report of sale has not then been confirmed, and the right of action thereon is barred after the lapse of fifteen years from the maturity of the bond.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Barbour.

In November, 1863, in the action of J. N. Clement, assignee of Richard Stewart, against James Oakley, a judgment was rendered ordering the sale of forty acres of land. S. P. Martin was appointed special commissioner to execute the order, and was directed to sell the property on a credit of nine, eighteen and twenty-four months and take bonds for the purchase price payable to the plaintiff, and was required on the payment of the price to convey the property to the purchaser by special warranty.

The property was sold by the commissioner on the 14th of December, 1863, and was purchased by H. R. D. Coleman, who

executed his three bonds bearing that date, each for \$225.33 $\frac{1}{3}$, payable to the plaintiff, and due respectively in nine, eighteen and twenty-four months, and each having the force and effect of a replevin bond.

May 11, 1865, the first bond was paid off and \$86.90 was paid on the second bond. After the sale the special commissioner died, without having made any report to the court.

Richard Stewart, the assignor of Clement, the plaintiff in the action against Oakley, died in 1863, and S. Hodge was appointed administrator of his estate. Coleman, the purchaser, sold the land in 1867 and died in 1868, leaving a will devising his estate to two of the appellees (and others who were defendants in this action), and nominated S. Hodge as his executor, who duly qualified as such in 1868.

In June, 1871, the court ordered the appellant, J. H. Walker, as special commissioner, to examine the papers, take proof and report the facts concerning the sale by the commissioner, Martin. Walker, at the same term of the court, reported the facts as hereinbefore recited. Nothing was done in the case, however, until May, 1883, when Walker, as commissioner, was directed to collect the sale bonds by suit or otherwise. Appellant, in pursuance of this order, instituted this action against Coleman's devisees and the vendees to whom he had sold the land. The appellees in their answer rely on the statute of limitation as a bar to any recovery against them.

The main trouble arises in determining when the cause of action accrued upon the sale bonds.

The action is barred by section 1, article 3, chapter 71, General Statutes, which is identical with section 1, article 3, chapter 63, Revised Statutes, unless the cause of action did not accrue until the report of the sale had been confirmed.

It was not necessary that the court should order the collection of the bonds before steps could be taken for their collection, for the bonds are payable to the plaintiff in the action in which the property was sold. And they by their terms having the force and effect of replevin bonds, the plaintiff could, as

they matured, have executions issued on them unless the fact of the sale not being reported should prevent the exercise of such right.

We are of opinion that the obligor had the right to pay them as the bonds became due by their terms. It, therefore, logically follows that the plaintiff would also have had the right to coerce their payment though the report of sale had not been confirmed.

We of course recognize that certain facts might exist, or certain contingencies might arise, which would alter the rights of the parties. If, in such event, the collection of the bonds should be attempted the chancellor might interfere by injunction to prevent the collection, but we do not think that the obligor could restrain the collection of the bond by injunction on the ground simply that the sale had not been confirmed. In this case Coleman nor his devisees were in any attitude to resist the collection of the bonds, for it is alleged in the petition, and admitted in the answer, that Coleman sold the land in 1867, and received the whole of the purchase price. In *Vance v. Foster*, 9 Bush, 390, the court held that, though the property sold by the commissioner was destroyed by fire before the confirmation of the sale, the accepted bidder would be compelled by rule to comply with the terms of his purchase. And the court in that case quoted from 1 Selden, 151, where it is said: "In England the biddings in the master's office are in the nature of proposals for the purchase, subject of course to the approbation of the chancellor, without which they have no validity, even *prima facie*. But with us the sale is strictly judicial, binding all parties from the time when the property is struck off, and can not be set aside in general, except for reasons which would prevent a specific performance in case of a contract for purchase between individuals." And in *Stump v. Martin*, 9 Bush, 289, the court says that a sale will not be set aside for inadequacy of price. "There must be either fraud or misconduct in some one connected with the sale, some surprise or misapprehension on the part of those interested, or

of the officer who conducts the sale, or some irregularity in the proceedings or other circumstances attending it, conducing to show unfairness, before the chancellor will refuse to confirm this act of his commissioner."

While of course the bidder acquires no legal title to the property until after the confirmation, he does acquire an inchoate title—such an interest as he has the right to demand shall be perfected into a valid title unless for some good cause shown he should be deprived of that right. In other words, he acquires an interest by his bid and the execution of the bond that the court can not disregard, except for some good and sufficient reason. Suppose a sale is ordered on such short credit that the bond matures before a court convenes at which the sale can be confirmed. Can there be any question but what the plaintiff, to whom the bond is payable, could, according to its terms, collect it?

The statute is broad. "An action or suit upon a recognizance bond or written contract, * * * an action upon an appeal bond, * * * or any other bond taken by a court or judge, or by an officer pursuant to the directions of a court or judge, in an action, or after judgment or decree, or upon a replevin, sale or delivery bond, taken under execution, decree, etc., * * * or for the performance of any undertaking, shall be commenced within fifteen years after the cause of action accrued."

Nor do we think it is at all material that S. Hodge was administrator of Stewart's estate, and also executor of Coleman.

The creditors and parties were all before the court, and could have taken steps at any time after the maturity of the bonds to collect them. (Turner v. Rankin, 80 Ky., 180.)

The judgment is affirmed.

John W. Blue for appellant.

Yeaman & Lockett for appellee.

COURT OF APPEALS ABSTRACTS.

OGDEN v. OGDEN'S GUARDIAN.

Filed November 6, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Holt. affirming.

1. Right of one not a party to contract to sue—A contract for the settlement of a will controversy containing a provision for the benefit of the widow, her committee, she having become a lunatic, was entitled to sue upon it, although she did not sign it, it appearing that she approved it.

2. Estoppel—Persons having asserted rights under a contract are thereafter estopped to deny that they were parties to the contract.

3. Suit on administrator's bond—A contract between the parties in interest is treated in this case as a settlement of a decedent's estate, and is held to have rendered a suit to settle the estate unnecessary in order to authorize a suit upon the administrator's bond.

4. To avoid circuity of action and multiplicity of suits an action upon an administrator's bond, being in equity, will be treated as a suit to settle the estate, if such a suit be deemed necessary.

W. N. Sweeney & Son for appellant.

Owen & Ellis for appellee.

GAFFNEY v. PENNSYLVANIA CO.

Filed November 9, 1886. Appeal from Jefferson Court of Common Pleas. Response of the court by Judge Bennett to petition for rehearing.

1. Reversible errors—In the absence of a motion for a new trial there can be no reversal for errors occurring upon the trial.

2. Willful neglect—Pleading—The court is inclined to the opinion that upon an allegation of "negligence and carelessness" the plaintiff is not entitled to a verdict against the defendant upon the ground of willful neglect.

3. Willful neglect includes ordinary neglect, but ordinary neglect does not include willful neglect.

Wm. Lindsay and O'Neal, Jackson & Phelps for appellant.

C. H. Gibson for appellee.

WORTHINGTON v. CAMPBELL.

Filed November 9, 1886. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Lewis. reversing.

1. Vendor and vendee—Rescission—The chancellor properly rescinded a contract for the sale of land and personalty for want of mental capacity in the vendee, although the parties could not be placed in statu quo as to the personal property.

2. Receiver—It was error to the prejudice of the vendor to appoint a re-

receiver after it was in effect adjudged that the contract for the sale of the land was rescinded.

3. Rents—Upon the rescission of the contract for the sale of the land the vendor was entitled to judgment for the annual rental value of the land from the time the vendee got possession under his purchase until the possession was restored to the vendor, without regard to what the land actually rented for.

Leslie T. Applegate for appellant.

C. H. Lee for appellee.

CORNELISON v. STEPHENS.

Filed November 11, 1886. Appeal from Montgomery Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Attorneys—Notice of motion—As the notice of the motion to reinstate the case on the docket was given to an attorney whose name appears more than once on the records, the notice was sufficient to authorize the reinstatement of the case.

2. Homestead—Purchaser at judicial sale—Several notes falling due at different times were secured by the same mortgage. In an action to enforce the mortgage lien as to the first note a judgment was rendered for the sale of the land, which was reversed upon the ground that the defendant was entitled to a homestead. Before the homestead was set apart pursuant to the decision of this court the mortgagee proceeded to coerce payment of the remaining notes secured by the same mortgage, and obtained an order for the sale of the land, which he purchased at the sale which was made after the reversal of the first judgment. Held—That the plaintiff had full notice of the right of the defendant, and acquired no title by his purchase of the homestead.

Cornelison & Mitchell for appellant.

Wood & Day and W. H. Holt for appellee.

McKEE v. COMMONWEALTH.

Filed November 11, 1886. Appeal from Anderson Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Practice—Reversible error—As there was evidence before the jury tending to prove the accused guilty of the offense charged, this court can not reverse upon the ground that the verdict was against the evidence.

2. Verdict by lot—A judgment of conviction in a criminal case can not be reversed upon the ground that the verdict of the jury was decided by lot.

C. B. Butler for appellant.

P. W. Hardin for appellee.

FARRIS v. COMMONWEALTH.

Filed November 11, 1886. Appeal from Bourbon Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. The right of self-defense does not authorize one to hunt up his adversary that he may slay him upon the idea that it is necessary to save his own life.

2. Mental weakness as excuse for crime—Upon the issue as to whether the accused had mind enough to make him responsible for his acts the jury were properly told that if his mind was so feeble as not to enable him to know right from wrong, or if he had not sufficient power of control to gov-

ern his action by reason of mental weakness, they should acquit. The burden was on the accused to make out this defense, and the jury could not have supposed that he was required to establish it beyond a reasonable doubt.

E. M. Dickson for appellant.

P. W. Hardin for appellee.

WREN v. COMMONWEALTH.

Filed November 11, 1886. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Lewis, affirming.

Change of venue—Prejudicial error—Whether the applicant for a change of venue in a criminal case is entitled thereto must in each case be determined from the evidence produced by both parties; and this court ought not to reverse a judgment of conviction unless clearly satisfied that the lower court erred in overruling the application, and not then unless upon consideration of the whole case the court is satisfied that the substantial rights of the defendant have been prejudiced thereby.

As the testimony in this case as to the state of the feeling in the county toward the accused was conflicting the court can not say that the lower court erred in refusing the application for a change of venue. Besides, this court is satisfied that the substantial rights of the accused have not been prejudiced by the action of the court, as he could not properly have been found guilty of a less offense than murder, of which the jury found him guilty.

Geo. Lockhart, James E. Cantrill and Offutt & Ford for appellant.

P. W. Hardin for appellee.

MARCUM v. COMMONWEALTH.

Filed November 13, 1886. Appeal from Lawrence Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Dying declarations—The statements of the deceased identifying the accused as his murderer were admissible in evidence as his dying declarations, having been made by him with full knowledge that he must die in a few hours.

2. Instruction as to malice—An instruction attempting to define malice was not prejudicial, the only issue in the case being as to the identity of the accused.

3. Motive for killing—The fact that no motive for the killing upon the part of the defendant was shown does not authorize the court to disturb the verdict of guilt, there being evidence to support the verdict.

4. Separation of witnesses—Although the other witnesses were excluded from the court room, it was proper for the court to allow one of the witnesses for the prosecution, who was a kinsman of the deceased, and who had, as an interested party, investigated the case, to remain in the room after he testified, that he might consult with and advise the attorney for the Commonwealth.

5. Reversible error—This court has no power to reverse for an error in overruling a motion for a new trial.

6. Selection of jury—The court acted properly in excluding from the jury, at the instance of the attorney for the Commonwealth, those who had conscientious scruples as to the infliction of the death penalty.

Alexander Lackey for appellant.

P. W. Hardin for appellee.

HASKINS v. COMMONWEALTH.

Filed November 13, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Separation of witnesses—Although one of the witnesses remained in the court room and heard the other witnesses testify, contrary to the instructions of the court, it was within the province of the court, after hearing his excuse for remaining in the court room, to admit or reject him as a witness, and nothing appearing to the contrary this court must presume that the lower court did not abuse its discretion in allowing the witness to testify.

2. New trial—Former conviction—Where a new trial has been granted to one at his instance and request, he can not plead the former trial and conviction in bar of a further prosecution for the same offense.

S. A. Russell for appellant.

P. W. Hardin for appellee.

WILLIAMS, &c. v. WILLIAMS.

Filed November 20, 1886. Appeal from Hopkins Circuit Court. Opinion of the court by Judge Holt, affirming.

Wills—Appeals—Upon an appeal in a will controversy, whether the issue was tried by a jury or by the circuit judge, the Court of Appeals does not now "try both law and fact" as it did prior to the adoption of the General Statutes, but must give to the judgment the same effect as the judgment in any other ordinary action.

John Feland for appellants.

A. Duvall for appellee.

SPICER v. JONES, &c.

Filed November 20, 1886. Appeal from Franklin Court of Common Pleas. Opinion of the court by Chief Justice Pryor, affirming.

Vendor and vendee—Rescission—Time is not of the essence of an ordinary contract for the sale and conveyance of land, and when the title is perfected the purchaser in possession must give some other reason than the failure to convey at the time stipulated before the chancellor will rescind.

John L. Scott for appellant.

L. Hord for appellees.

DEAN v. LEAN'S ADM'R.

Filed November 20, 1886. Appeal from Breckinridge Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Pleading—Defect cured—If there has been a total omission to state a cause of action in a petition, neither the judgment of the court nor the answer filed by the defendant can cure the defect, but where the cause of action is imperfectly stated the omission may be cured by the pleading of the defendant, or by the verdict or judgment rendered upon the issue tendered.

An administrator sued for the value of personal property sold by his intestate to the defendant, alleging that the defendant agreed with the intestate to pay the value of the property after the intestate's death either "to his administrator or to his children and distributes," but that he did not know to which of the two it was to be paid. The defendant answered, deny-

ing "that he undertook or promised to pay at any time to any person." Judgment was rendered for the plaintiff. Held—That while the petition was bad on demurrer, and judgment could not have been rendered by default, yet the defect was cured by the issue made and the judgment thereon.

2. Allegation and proof—Variance—Although the administrator alleged that the promise was to pay after the death of his intestate, he was entitled to recover upon proof of facts which established liability upon the part of the defendant to the intestate before the latter's death.

3. Administrators—The contract by the defendant to pay for the property being established, in the absence of any proof showing that the value was to be paid directly to the children of the intestate the right of recovery is in the administrator.

4. Pleading—Prayer for relief—The prayer of the administrator's petition being "that the accounts between the distributees be settled, and that the defendant be compelled to pay to each distributee the amount found due them, and for other proper relief," the judgment defendant has no right to complain that the court, instead of following the prayer of the petition for a distribution of the amount found to be due, gave judgment for the plaintiff as administrator, deducting the interests of the defendant, and also the interest of one of his brothers, who disclaimed any right to a judgment.

5. Burden of proof—A deed for land from the intestate to the defendant being exhibited, the recited consideration for which was the agreement by the grantee to support the grantor, the burden was on the defendant to show that this same agreement was the consideration for personal property sold to him at the same time.

Lewis & Fairleigh, Kincheloe & Eskridge and Richards & Hines for appellant.

G. W. Williams and J. A. Dean for appellee.

DIXON, SURVIVOR v. FORD.

Filed November 20, 1886. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Lewis, affirming.

Pleading—Rejoinder—The affirmative allegations in a rejoinder can not be taken for confessed because of the failure to controvert them, an issue upon all the matters in controversy having already been formed when the rejoinder was filed.

W. H. Cord and Cunningham & Turney for appellant.

Offutt & Ford for appellee.

BURNS v. BURRICKE.

Filed November 23, 1886. Appeal from Fleming Circuit Court. Opinion of the court by Judge Pryor, reversing.

Bankruptcy—After a creditor of a bankrupt has filed his claim in the bankrupt court he can not prosecute an ordinary action on the same claim in the State court, although there may have been delay in the prosecution of the bankrupt proceedings.

W. H. Cord for appellant.

W. A. Sudduth for appellee.

LEE, &c. v. CAMPBELL.

Filed November 23, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Holt, reversing.

1. Homestead and dower—The owner of two adjoining tracts of land, upon the smaller of which he lived, mortgaged them separately, his wife not uniting in the mortgages. The mortgages were enforced, both tracts sold and the mortgagor paid \$1,000 for his homestead right. This money he invested in a home, which, after his death, was sold under a mortgage, the widow being paid out of the proceeds \$1,000 as her homestead right. The widow asserted claim to dower in the two tracts of land originally mortgaged, and compromised with the owner of the smaller tract. This action is to recover dower in the other tract.

Held—That the widow is not estopped to claim dower in this tract of land by reason of the fact that she indirectly received the benefit of the money paid to her husband as his homestead right. Nor is the court inclined to regard this tract as a part of the original home tract, the two tracts having been purchased separately and afterward mortgaged separately and sold separately, and, therefore, a compromise by the widow with the owner of the home tract can not affect her right to dower in this tract.

2. Rent of dower—The widow was entitled to one-third of the back rents accruing from the time she brought her suit, considering the land in its condition when they accrued, and the proper method of arriving at the amount was to ascertain what the rent of the whole place was worth during that time, and allow her one-third thereof.

3. It was not premature to give judgment for back rents before dower had been allotted by commissioners.

4. Husband and wife—Personal judgment—The title to the land in which dower was sought being in a married woman, it was proper to render personal judgment against her husband for back rents, he having had the possession of the land and being entitled by law to the use of it, but a personal judgment against the wife was not only improper, but void.

Samuel Avritt for appellants.

TEM MEN, &c. v. SAYRE & CO.

Filed November 23, 1886. Appeal from Fayette Circuit Court. Opinion of the court by Judge Bennett, reversing.

1. Principal and agent—An agent, whether general or special, can not act as such and at the same time act in his own behalf against the interest of his principal. When that antagonism of interest arises the law vacates the agency.

2. Landlord and tenant—Insurance by tenant—A tenant authorized by the landlord to insure the rented property and deduct the premiums paid from the rent, had no authority to insure the property for the benefit of his own creditor, and the property having been burned, the landlord, and not the tenant's creditor, is entitled to the proceeds of the insurance, although the policy provided that the loss, if any, should be payable to the latter, as the

creditor was bound to know that the tenant was acting against the interest of the landlord in allowing the insurance to be taken in this way.

Hunt & Darnall, Stevenson & Goebel and Jordan & Jordan for appellants.
R. A. Thornton for appellees.

SUPERIOR COURT ABSTRACTS.

MERRIFIELD v. TYLER, &c.

Filed October 13, 1886. Appeal from Nelson Circuit Court. Opinion of the court by presiding Judge Bowden, reversing.

1. Vendor's lien—Apportionment—When a lien exists on a tract of land and it is subsequently sold in different parcels to different persons a pro rata apportionment ought to be made, so that each will pay his proper share, and it is not material whether the parcels are held by simultaneous or by successive deeds.

2. Release of lien on one of several parcels—If a vendor, having notice of the sale by the vendee of different parcels to different persons, releases his lien upon one of the parcels, he thereby discharges a part of the debt equal to the ratable portion thereof chargeable upon the lot released, while the balance of the debt alone remains a burden upon the other parcels.

3. Vendor and vendee—Breach of warranty—While the general rule is that when a vendee has accepted a deed containing a simple covenant of warranty and has taken possession under it, there is no breach of the covenant until there has been an eviction, yet when there is a lien or encumbrance on the property, and the grantor becomes insolvent or removes himself and his property from the State, there is such a breach of the covenant to remove the encumbrance that the grantee is not compelled to wait until there is a judgment to enforce the encumbrance, and may actively interpose and ask the assistance of the court for his protection.

4. Assignor and assignee—Where a vendor could not have compelled the payment of the purchase money notes without removing an encumbrance upon the land, his assignee acquired no greater right.

John A. Fulton for appellant.

John D. Wickliffe for appellees.

CREUTZ, &c. v. ARTSMAN, &c.

Filed October 13, 1886. Appeal from Campbell Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Petition on administrator's bond—In an action upon an administrator's bond, an allegation that the administrator "executed bond in said court with the defendant as surety" is not an allegation that the appointed administrator, as principal, and the defendant, as his surety, executed bond, and is not sufficient to sustain a judgment against the surety.

2. Administrators—Surety—To hold the surety of an administrator liable for the default of his principal the sources from which the funds were received by the administrator must be alleged, so as to show that the administrator was in default as to funds embraced by the provisions of his bond.

3. Judgment—Only parties bound by—In order that the surety of an administrator may be precluded by a judgment ascertaining the balance in his principal's hands it must appear that he was a party to the action.

Nelson & Washington for appellants.

John S. Ducker for appellees.

RIGGS v. WHITE, &c.

Filed October 13, 1886. Appeal from Monroe Circuit Court. Opinion of the court by Judge Ward, affirming.

New trials—Loss of exhibit—An exhibit upon which the defendant relied to sustain his defense was lost from the papers of the suit, but the loss was not discovered until after judgment, the defendant's attorney being sick at the time of trial. The defendant now asks a new trial because of "unavoidable casualty or misfortune," preventing him from having a fair trial. Held—That as the lost writing did not purport to be the act of the adverse party, it was not competent evidence against him unless its execution was proved, which it is not claimed was done, therefore, its loss as testimony was of no consequence. Moreover, the petition for a new trial alleges that the burden was on the plaintiff, and that the plaintiff introduced no proof, so the defendant did not need any evidence, and, therefore, the loss of the paper worked no injury.

Lewis McQuown or appellant.

FIELD v. WILLIAMS.

Filed October 13, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

Sale of personal property—Tender—Appellant sold to appellee a particular lot of cattle, 115 in number, which the contract described as the "cattle which I am now feeding at my distillery." The cattle were to be delivered at a future-named date, and were to be "in marketable condition for beef," the purchaser to pay a fixed price per pound upon delivery. The appellant tendered 110 head, and claims that he was prevented from tendering the others by "the act of God." Appellee refusing to receive the cattle tendered, appellant seeks to recover damages.

Held—That the contract was for the sale of a particular lot of cattle, and could not be performed by tendering less than the entire lot, even though the seller was prevented by the "act of God from tendering his entire lot;" but even if the seller was excused from tendering the entire lot, he had no right to tender cattle not in "a marketable condition," and some of the cattle tendered not being marketable the tender was not good.

W. N. Sweeney & Sons and Weir, Weir & Walker for appellant.

George W. Jolly and W. T. Ellis for appellee.

DEVON v. NAUNHEIM'S ADM'R.

Filed October 13, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming on original and reversing on cross appeal.

1. Payment of usury—All payments made for the loan or forbearance of money will, at the election of the borrower, be regarded as payments, first upon the legal interest then due, and then as a satisfaction pro tanto of the principal; there can, therefore, be no such thing as payment of usury which will prevent this right of election so long as any part of the principal sum with legal interest remains unpaid.

2. Forfeiture of interest—Repeal of statute—Since the repeal of the statute providing for the forfeiture of all interest where a greater rate than that allowed by law was charged, the penalty can not be enforced, although the contract was made while the statute was in force; so the obligee may now recover his debt with interest.

3. "Legal" interest—The "legal rate" of interest is the rate fixed by law in the event the parties have made no enforceable contract for another rate, and is not the highest rate named in the statute for which the parties could have contracted.

4. Evasion of usury law—Where the principal sum claimed to be due, being much larger than the sum actually due, was made to bear interest at 10 per cent., the sum really due was intentionally made to bear a rate of interest in excess of 10 per cent.

Weir, Weir & Walker for appellant.

Geo. W. Jolly for appellee.

GODSEY v. SMITH.

Filed October 13, 1886. Appeal from Wolfe Circuit Court. Opinion of the court by Judge Barbour, affirming.

Fraud—Pleading—Allegations of fraud not sustained by the facts alleged are but conclusions of law, and are of no value.

J. B. White for appellant.

HICKMAN v. TUDOR.

Filed October 13, 1886. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, reversing.

Domestic relations—Stepfather and stepchild—Where a stepfather assumes the care and support of his stepchild he stands in the place of a parent, and while this relationship exists he can not charge for the child's maintenance, nor can the child recover for services.

In this case the stepfather promised his wife to raise her child as his own, and not to charge him board. Held—That the stepfather is estopped from asserting any claim for the board, clothing and tuition of the child.

W. H. Cord and Thos. R. Phister for appellant.

Wadsworth & Son for appellee.

MYERS, &c. v. WHALEY.

Filed October 18, 1886. Appeal from Bath Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Costs—Commissioner's report—Failure to except—In an action by one of the propounders of a will, who had paid out considerable sums of money as attorney's fees and necessary expenses, against the other propounders for contribution, in which one of the defendants admitted that he agreed to bear his part of the county court expenses, but denied that he agreed to pay any costs in the further effort to maintain the will, the cause having been referred to the master to audit and settle the accounts and to take proof and report, and the master having stated the items of expense and reported them as incurred by the propounders of the will, which implied that the act of incurring was the act of all, the confirmation of the report without exceptions precludes the defendants from now questioning the correctness of the master's finding.

H. V. Young and H. L. Stone for appellants.

R. Gudgell & Son for appellee.

WOLF v. GLENN, &c.

Filed October 18, 1886. Appeal from Davies Circuit Court. Opinion of the court by Judge Ward, dismissing as to one appellee and affirming as to the other.

1. Appeals—Jurisdiction—Upon an appeal from a judgment awarding to the claimant of attached property a certain amount out of the proceeds, the amount adjudged to him is the amount in controversy, and that being less than \$100, no appeal lies.

2. Exemptions—Pleading—Where a debtor claims the exemptions allowed by statute to a bona fide housekeeper with a family his failure to allege specifically that he resides in this Commonwealth is not fatal to his claim. In this case the allegation of the defendant that he is a bona fide housekeeper with a family of six children and a wife, all living at home and dependent upon him for a support, was sufficient to bring him within the provisions of the statute, these averments taken in connection with the fact that he was proceeded against as a resident of the State being sufficient to support the finding that he was a resident of the State.

3. Exemptions—It is immaterial to the creditor whether specific property of the value named in the statute be set apart to the debtor or whether that which is not specifically exempt is sold and so much of the proceeds paid over to the debtor as the law allows. While the sale of the property may not have been absolutely necessary in this case, it was not injurious to the rights of the creditor.

W. Carrico for appellant.

Owen & Ellis for appellees

PENN v. PENN.

Filed October 19, 1886. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Barbour, affirming, Judge Ward, not sitting.

1. Set-off—In this action by appellee to recover of appellant a certain amount he had paid as surety for him, appellant was not entitled to plead as a set-off a large but unascertained amount which he says will be due to him from appellee upon a settlement of appellee's accounts as the administrator of his father. Unliquidated demands can not be pleaded by way of set-off except in stated cases, none of which exist here.

2. Failure to give leave to amend—While the court, upon sustaining a demurrer to the defendant's answer, should have given him leave to amend, yet as the defendant did not offer to amend, and it is not suggested that he had any other matter of defense, it does not appear that he was prejudiced by the action of the court.

3. Sheriff's half commission—Upon appeal to the circuit court from a judgment of the quarterly court, after execution had been issued and levied, there was no impropriety in the circuit court giving the plaintiff judgment for the amount of the sheriff's half commission.

J. Q. Ward and E. M. Dickson for appellant.

PRITCHETT v. DIXON.

Filed October 20, 1886. Appeal from Henderson Circuit Court. Opinion of the court by Judge Ward, affirming. Judge Barbour, dissenting.

Appeals—Separation of conclusions of law and fact—Where the law and facts in an ordinary action are submitted to the court, if there is no separation by the judge of the conclusions of law from the conclusions of fact there can be no exception, and consequently upon appeal nothing can be considered except the pleadings.

Judge Barbour, dissenting, holds that no such separation is necessary to enable this court to determine that there was no evidence which could have authorized the judgment.

Montgomery Merritt for appellant.

Yeaman & Lockett for appellee.

JONES, &c. v. MACKIE, NESBITT & CO.

Filed October 20, 1886. Appeal from Caldwell Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Fraudulent preference—A transfer of goods by a merchant to his creditor in payment of a debt is not a sale of goods in the regular course of trade, and, the merchant being insolvent, is a preference of one creditor to the exclusion of others.

2. E. shipped to J. ten barrels of flour "to be sold on commission," net amount due E. to be \$55. J. had sold eight barrels and paid E. \$20, leaving due \$24. To satisfy this balance J., who was an insolvent merchant, transferred goods to E. Held—That E. was a creditor of J., and that this was a preference. While the transaction was a small one, the court can not fix a limit below which failing debtors may prefer with impunity.

F. W. Darby for appellants.

William Marble for appellees.

HOLMAN v. BANK OF ADAIRVILLE.

Filed October 20, 1886. Appeal from Logan Circuit Court. Opinion of the court by Judge Barbour reversing.

Sureties—Release—Where a creditor has sued the principal debtor and acquired a lien upon his property by the levy of an attachment, if he voluntarily releases his lien he releases those who are bound for the debt as sureties.

W. W. Frazer for appellant.

FOX v. POOR RIDGE AND SUGAR CREEK TURNPIKE ROAD CO.

Filed October 20, 1886. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, affirming.

Contracts—Damages—The petition in this case alleges that the plaintiff built for the defendant five miles of turnpike for which the latter was to pay him at the rate of \$2,000 per mile; that he was to be paid 8 per cent. on the road completed and received by the engineer at the expiration of every thirty days, and at the completion of each mile of said road and the receipt of the same by the engineer the 20 per cent. retained was to be paid; that he hired hands, teams, etc., agreeing to pay them as defendant paid him; that defendant, knowing this, and knowing that plaintiff had no money, failed to pay him as agreed; and that in consequence of this his hands raised prices on him and numbers of them quit work, causing him to employ others at a higher rate, which he was obliged to pay, whereby he was greatly damaged, etc. Held—That a demurrer to the petition was properly sustained, as the damages claimed are not the natural and proximate consequence of the failure of the defendant to pay on the days the several payments became due, and it is not claimed that the defendant has failed to pay any part of the money which was due under the contract, only that he did not pay it when it became due.

W. O. Bradley, J. H. Brown and George Denny, Jr., for appellant.

R. H. Tomlinson for appellee.

McKINNEY'S ADM'R v. HARGIS, &c.

Filed October 20, 1886. Appeal from Trigg Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Husband and wife—Liability of wife's land—The wife having become a surety upon a note executed by the husband for borrowed money, the fact that the husband used the money in putting up a dwelling house on the wife's land, in which he had, as husband, an estate for life, does not render the wife's land liable under the statute.

Robert Crenshaw for appellant.

R. A. Burnett for appellees.

BRENTS v. VITTATOE'S ADM'R.

Filed October 22, 1886. Appeal from Clinton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. **Administrators—Jurisdiction to appoint**—Where the county court has appointed an administrator the presumption is in favor of the jurisdiction of the court to make the appointment, even though the intestate was a resident of another State.

2. **Set-off**—One can not pay a distributee and plead the amount as a set-off in an action by the administrator against him.

C. P. Gray for appellant.

Montgomery & Jones for appellee.

JOHNSON v. HATFIELD & SON.

Filed October 22, 1886. Appeal from Whitley Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. **Attachments—Levy**—The act of posting a copy of an order of attach

ment on a lot of staves created no lien thereon, and the defendants, or any one else having an interest, could have made a valid objection to a sale under the supposed levy, but it does not concern any other person.

2. Claimant of attached property—The fact that one who claimed to be the exclusive owner of attached property had a mortgage on the property does not entitle him to have the judgment against him reversed in order that he may assert his claim as mortgagee, the only claim asserted in his pleading being that of ownership.

C. W. Lester for appellant.

John Smith for appellees.

VARNON, &c. v. CHESTNUT, &c.

Filed October 22, 1886. Appeal from Whitley Circuit Court. Opinion of the court by Judge Ward, reversing.

Assignment by parol—Equities—A debt may be assigned in parol or by a verbal order or agreement without the assent of the debtor.

In this case a written order or direction to the debtor to pay, even though not accepted, was an assignment of the debt, and being prior to the attachment lien of the plaintiff is superior thereto. The contest being between equities, that which is prior in time must prevail.

T. C. Bell for appellants.

R. D. Hill for appellees.

FERGUSON v. FERGUSON.

Filed October 25, 1886. Appeal from Henry Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Divorce—Separation—Insanity—While a divorce may be granted to both husband and wife who have lived separate without any cohabitation for five consecutive years next before the application, the statute assumes that the parties have lived separate because of their mutual purpose to do so, or because one so determined and the other acquiesced.

As the husband in this case was insane, and confined in an asylum, he neither actively nor passively contributed to the separation, and the wife is, therefore, not entitled to a divorce, mere insanity not being a ground for divorce.

Carroll & Barbour for appellant.

Newton Webb for appellee.

C., O. & S. W. R. R. CO. v. PARK.

Filed October 25, 1886. Appeal from Muhlenburg Circuit Court. Opinion of the court by Judge Ward, affirming.

Contracts—Compensation of railroad agent—A mining company, thinking it to their interest that there should be a station agent at a station on appellant's road of no general importance applied to appellant to appoint one; thereupon appellant appointed appellee upon condition that he was to be paid by the mining company, any of the parties having the right to terminate the employment at will. The business of the station having increased, appellee complained to the mining company that he ought to have a larger salary; the mining company claimed that any additional compensation should be paid by appellant, and united with appellee in a request to appellant to give

appellee further compensation. Appellant, neither refusing nor agreeing to give appellee extra compensation, received the benefit of his services under the promise that it would do what was "right" about the matter. Held—That after a reasonable time had been given for a definite answer this was a cancellation of the original agreement, and the substitution therefor of an agreement to do what was right, and the parties having failed to agree what was right the law will determine that matter for them.

P. H. Darby for appellant.

W. H. Yost for appellee.

JOHNSON v. CRUTCHER.

Filed October 28, 1886. Appeal from Franklin Circuit Court. Opinion of the court by Judge Ward, affirming.

Usury—The laws against usury can not be evaded by overvaluing property as a means of loaning money at a usurious rate, nor by undervaluing property as a means of paying usury. In either case a court of equity will inquire into the transaction, upon proper pleadings, and purge the transaction in the one case of the usury, and in the other case adjudge its recovery to the extent it may have been paid.

In this case the vendor of land having taken in payment therefor his own note contaminated with usury, is entitled to recover of the vendee the difference between the recited consideration for the conveyance and the debt with legal interest.

John L. Scott for appellant.

Geo. C. Drane for appellee.

PFIRMAN v. SCHNEIDER.

Filed October 28, 1886. Appeal from Campbell Circuit Court. Opinion of the court by Judge Ward, affirming.

Excessive verdicts—Damages—A verdict can not be complained of as excessive unless there was an error as to the mode of assessing the damages, or unless the damages are so excessive as to appear to have been given under the influence of passion or prejudice.

In this action for damages for the breach of a contract not to engage in the stove business in the city of Newport for a limited time the jury had the right to consider the population of the city, the number of persons therein engaged in the stove business, and that both the plaintiff and defendant were engaged in the business, and the court can not say, in view of the evidence, that a verdict for \$175 is excessive.

L. J. Crawford for appellant.

T. P. McKibben for appellee.

DAY v. BROOKS.

Filed October 28, 1886. Appeal from Morgan Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Construction of statutes—One of the cardinal rules in the construction of statutes is that every statute ought to be expounded not according to the letter, but according to the meaning.

2. County attorney's per cent. of forfeited bond—Where a county attorney

has appeared in the examining court and prosecuted, and has succeeded in having the accused held over and admitted to bail, upon the forfeiture of the bond in the circuit court he is entitled to one-half of the Commonwealth's attorney's per centum, although the bond was taken by the county judge after the adjournment of the examining court. Such a bond is a "bail bond taken by the examining court" within the meaning of the statute allowing the county attorney one-half of the per centum of the Commonwealth's attorney.

Hazelrigg & Orear for appellant.

C. R. Brooks for appellee.

O. & N. R. R. CO. v. HILLMAN.

Filed October 26, 1886. Appeal from McLean Circuit Court. Opinion of the court by Judge Barbour, reversing.

Special verdicts—New trial—Where any of the special findings of a jury are so palpably wrong as to indicate that they were found under the influence of passion or prejudice the entire verdict should be set aside; in such a case the court can not say that any of the findings are free from the same taint of passion and prejudice.

The court, however, does not wish to be understood as holding that the special verdict of a jury, in answer to several questions submitted to them, must, in all cases, be regarded as an entirety, and that all or none must be allowed to stand.

W. N. Sweeney and R. S. Bevier for appellant.

Charles Eaves for appellee.

MOBILE & OHIO R. R. CO. v. GILLIS.

Filed November 5, 1886. Appeal from Hickman Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Appellate practice—Instructions, how made part of record—The court may identify instructions by an order filing them as part of the record, or the judge may do so by signing a bill of exceptions in which they are contained; but if they are not part of the bill a statement in it referring to them by numbers as ordered to be filed, and stating that they are made part of the record, can not have the same effect as an order of court; nor will the court consider them, although they are copied into the transcript by the clerk and designated as the instructions referred to in the bill.

2. In absence of instructions sufficiency of evidence not considered—When the complaint is that the verdict is contrary to the law it is to be tested by the instructions given, therefore, in the absence of the instructions the court can not determine that question.

E. L. Russell for appellant.

Bullock & Husbands and Richards & Hines for appellee.

LANCASTER, &c. v. TURPIN, &c.

Filed November 5, 1886. Appeal from Hardin Circuit Court. Opinion of the court by Judge Ward, affirming.

1. The county judge in taking a guardian's bond must inquire as to the sufficiency of the surety; it is not enough to inquire as to the sufficiency of the bond.

2. Where the county judge has taken an insufficient surety upon a guar-

dian's bond, to enable him to escape liability for the damages the ward may sustain, he must show that he had such personal knowledge of the financial condition of the surety, or made inquiry and ascertained such facts, as would in the one case or the other have satisfied a man of ordinary care and prudence that the surety was sufficient.

3. All the instructions must be considered together in determining whether or not the court erred in giving particular instruction. If as a whole they present the law of the case that is sufficient.

Haycraft, Wilson & Sprigg for appellants.

Bush & Robertson for appellees.

HOWARD v. MOSLEY & HEAD.

Filed November 5, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. A motion for a new trial must be made within three days after the return of the verdict, although judgment be not then rendered upon the verdict.

2. Special verdict—The court may on its own motion order a special verdict, and neither party can take exception to the order.

Haycraft & Slack and Owen & Ellis for appellant.

Weir, Weir & Walker for appellees.

BRUMFIELD v. UNION INSURANCE CO.

Filed November 5, 1886. Appeal from McCracken Circuit Court. Opinion by Judge Ward, reversing, Presiding Judge Bowden delivering separate opinion, and Judge Barbour, dissenting.

1. Insurance—Waiver of notice of other insurance—Where an agent makes a contract of insurance with notice from the insured that he intends to take additional insurance in some other company this is a waiver of notice of other insurance which the policy requires the insured to give, the policy not providing how the notice shall be given.

In this case the policy contained a covenant upon the part of the assured to notify the company if at the time of the issuance of the policy, or at any time during its continuance, there should be any other insurance on the property. There was other insurance on the property applied for the day before this policy was issued, but the policy was not issued until after this one. The plaintiff testified that he told the agent when he applied to him that "he intended to divide his insurance on the property." This policy was for less than half the value of the property, which was worth more than the insurance in both companies. Held—That the evidence was sufficient to authorize the jury to find that the company waived notice of the additional insurance in another company.

J. M. Bigger for appellant.

Henry & Burnett for appellee.

SUTHERLAND v. OWENSBORO SAVINGS BANK.

Filed November 5, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, reversing.

Usury—Separate bonds constitute separate debts—Where separate obligations or bonds are executed by a debtor at the same time to the same obli-

gee, payable at different times, each constitutes a separate and distinct debt, and one of them having been paid off, with usury, the fact that the others remain unpaid will not extend the time within which the debtor may sue to recover the usury paid on the first bond; therefore, in an action upon the bonds remaining unpaid the debtor will not be entitled to a credit for usury paid on the first bond, more than one year having elapsed from the time of its payment.

Williams & Powers for appellant.

Owen & Ellis for appellee.

OWINGS v. JONES.

Filed November 8, 1886. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Husband and wife—Separate estate—The fact that a married woman made a trade for a buggy, and the fact that her husband gave her the money to pay for it, did not make it her separate estate. The title was in her husband, and, therefore, she can not maintain an action to recover the buggy from one who holds it adversely.

Cornellison & Mitchell for appellant.

H. M. Woodford for appellee.

L. & N. R. R. CO. v. MARTIN.

Filed November 8, 1886. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Railroads—Transportation of stock—Where the owner of live stock in contracting with a railroad company for its transportation agrees to go in charge and attend to the stock, the burden of proof is upon him to establish alleged negligence resulting in injury to the stock unless the company undertook to carry the stock knowing that he would not go, that being deemed a waiver by the company of his agreement to go; but where the owner starts upon the train upon which the stock is carried, and abandons it without notice to any of the company's servants, it can not be claimed that the company has waived his agreement to go in charge, and it being his duty under his contract to water and attend to the stock, he can not recover of the company for injury resulting from his failure to do so.

Wm. Lindsay and Porter & McQuown for appellant.

APPLEGATE v. BERRY.

Filed November 10, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Gaming contracts—Horse racing—By a contract between appellant and appellee the former undertook to take and train for the turf a horse belonging to appellee and pay all expenses, the appellee to have one-half the gross "winnings" and appellant to have one-half interest in the horse. In a suit by appellee upon the contract he alleges that appellant was to enter the horse "for such purses or stakes as might be offered by the different associations in the United States for racing purposes, and to pay to the plaintiff one-half of the gross winnings or purses."

Held—That the contract was not upon its face a gaming contract, as

"winnings" are only the money gained by success in a contest, and may consist entirely in premiums awarded by others than the contestants; therefore, the allegation that such was the contract not being denied, must be taken as true.

2. Under such a contract there can be no valid claim to participate in any winnings which were the result of wagering.

3. A "selling race" is one in which the owner of every horse entered as a contestant places a price on it before the race takes place, and when the race is over the winning horse is sold at auction at not less than the price previously fixed. If the price thus obtained is greater than that set by the owner the surplus constitutes a fund for the contesting owner of one or more of the defeated horses.

Held—That there is nothing in this record which suggests that such a race is a device for purposes of wagering, or that its object is other than to give the owner a chance to exhibit his horse's qualities in competition for a prize offered by the association, and to sell the horse after the race at not less than his fixed price, the excess over that price to be awarded as a premium to the owners of other contesting horses.

Geo. W. Williams & Son for appellant.

W. N. Sweeney & Son for appellee.

ROUNTREE, &c. v. STEPHENS, &c.

Filed November 10, 1886. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Executors and administrators—Liability for money received by widow for loss of decedent's life—The administrator and the widow of a decedent, who was killed by the alleged negligence of a railroad company, having effected a compromise with the company, and executed their receipt of the company for a sum of money which was paid to the widow in discharge of all claim which he and the administrator might have against the company, the administrator is not liable to the heirs of the decedent for the amount so paid to the widow upon the ground that it was his duty to have received it unless he could have maintained an action against the railroad company for the loss of his decedent's life, and to enable the heirs to recover of him they must allege such a state of facts as would have enabled him to have recovered of the company.

2. Action against railroad company for loss of life—To enable an administrator to recover of a railroad company for the loss of his decedent's life under section 1 of chapter 57 of the General Statutes he must allege that the decedent was not in the employment of the railroad company.

3. Willful neglect—Pleading—To enable either the widow or the heir, or the personal representative of a decedent, to recover under section 3 of chapter 57 of the General Statutes for the loss of decedent's life, it is necessary that the petition should allege, and that the proof should show, that the loss was caused by the willful neglect of the company.

The allegation in this case that the company "did negligently and willfully so manage their train" as to cause the death of the decedent was not an allegation of willful neglect.

Edwards & Hazlip for appellants.

G. W. Long for appellees.

BRANNIN, BRAND & GLOVER v. BRAWNER, &c.

Filed November 10, 1886. Appeal from Franklin Court of Common Pleas. Opinion of the court by Judge Barbour, reversing.

1. Pleading—Departure—When an amended petition seeks to recover for the same debt sought to be recovered in the original petition, but sets out a different evidence of it, the amendment is not a departure, and should be allowed to be filed.

In an action upon an account against joint defendants one of the defendants pleaded that the account had been merged into a note purporting to have been signed by both of the defendants, but also alleged that his name had been signed to the note without his authority, and that the note was void as to him. The plaintiff, by an amended petition, set up the note relied upon as a merger of the account.

Held—That the amended petition should not have been stricken from the files. If the note is valid as to both defendants the plaintiffs should be allowed to recover upon it, and if void as to one of the defendants the plaintiffs are entitled to recover upon the account.

2. Acceptance of note in satisfaction of account—While an account against several may be merged by the creditor's accepting in satisfaction of the joint account the note of the debtors, yet where the note into which it is alleged that the account has been merged purports to be the obligation of the joint defendants, when in fact it is void as to one of them, the account is not merged; therefore, where the defendant pleading the merger pleads at the same time that the note was executed without his authority, he can not resist the recovery upon the ground that it has been merged into the note.

Ira Julian for appellants.

HAY & SWEENEY v. WILLIAMS.

Filed November 10, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Practice—Dismissal without verdict—When a jury has been sworn and evidence heard, and the defendant wishes to demur to the evidence, or to the pleadings and evidence, the usual practice is to ask for a peremptory instruction, which the court gives, if of the opinion that the motion should be sustained, and upon the verdict returned a judgment dismissing the action goes of course; but if the court dismisses the action without requiring the jury to return a verdict the plaintiff is not prejudiced.

2. Dismissal without leave to amend—While it may be error after a demurrer to a petition has been overruled to adjudge the pleading insufficient and dismiss it without giving an opportunity to amend, yet as in this case there was a demurrer to the petition pending during the trial, and upon the

conclusion of the evidence the defendant moved to dismiss, the plaintiff had an opportunity to offer an amendment, and having failed to do so this court can not know that there was either the desire or the ability to amend.

3. Measure of damages—The damages which may be recovered for the breach of a contract are only such as are directly connected with the subject-matter of the contract for the breach of which the damages are asked; what a party might have made in some undertaking collateral to the one in controversy is never the proper subject for consideration in determining the damages he has sustained from a failure to do a particular thing.

For the refusal to comply with a contract to feed a certain number of cattle on still slop and roughness for a specified time the damage was the difference between the contract price and market price of the slop, if to be had; if not, then what it would have been worth to have had the cattle otherwise provided for with equal chances for improvement in condition and flesh, and the loss resulting from the preparation made by the plaintiff to comply with his part of the contract before notice of its abandonment. The claim that the plaintiff could and would have bought other cattle to eat the slop fed to the cattle which defendant refused to feed, and that by defendant's refusal plaintiff lost the profits which he would have made out of both transactions, is too uncertain and contingent to be considered.

As it does not appear in this case that the keeping and feeding of the cattle cost plaintiff more than it would have cost him under his contract, he was not damaged.

Sweeney & Son for appellants.

G. W. Jolly for appellee

CENTRAL PASSENGER R. R. CO. v. KUHN.

L. & N. R. R. Co. v. SAME.

Filed November 12, 1886. Appeals from Jefferson Court of Common Pleas.

Opinion of the court by Judge Ward, transferring to Court of Appeals.

Superior court—Jurisdiction—Appellee, claiming that an injury received by him was the result of the concurrent negligence of the two appellants, instituted suit against them jointly. Separate defenses were made, but a joint trial was had. There was only a special verdict. The jury found that the defendants were guilty of concurrent negligence, and that the appellee sustained \$5,000 damages, of which one of the defendants should pay \$3,000 and the other \$2,000. Judgment against each was rendered accordingly, and a judgment against both for cost. Each defendant appeals.

Held—That as each of the appellants has the right to insist that the sums awarded the appellee are too large in the aggregate, which, if true, will entitle each to a reversal, the amount in controversy is \$5,000, and the Superior Court has no jurisdiction of either appeal.

Brown, Humphrey & Davie, Wm. Lindsay and Barnett, Noble & Barnett for appellants.

O'Neal, Jackson & Phelps and Kohn & Parker for appellee.

LOUISVILLE AND EVANSVILLE MAIL CO. v. BARBOUR, SHERIFF.

Filed November 12, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

1. Corporations—Taxation—A corporation is not liable to taxation on "value under the equalization law" unless expressly so provided by statute. It is the duty of the stockholders to take their shares into account in making up the aggregate of what they are worth, and in that way to pay all the tax due on the corporate property not specifically named for taxation.

2. Statutes—Contemporaneous construction—The construction given to a statute by the officers intrusted with its execution during a long period immediately succeeding its enactment is entitled to great consideration by the courts in construing the statute.

3. Effect given to all the words of a statute—A construction which disregards or annuls some of the words of a statute can not be adopted if a reasonable construction can be given to it which will give effect to all the words employed.

4. The county court in assessing property for taxation acts ministerially, and not judicially, and the assessment is conclusive as to the amount and character of property owned by the corporation, and can not be reviewed in an action to enjoin the collection of the tax.

Brown, Humphrey & Davie and G. A. Winston for appellant.

B. W. Duke, Helm & Bruce and Kohn & Barker for appellee.

COMMONWEALTH v. WATTS.

Filed November 12, 1886. Appeal from Jefferson Circuit Court. Opinion of the court by Judge Ward, transferring to Court of Appeals.

Superior Court—Jurisdiction—In a proceeding upon a forfeited bail bond the defendant claimed that certain sections of the General Statutes had been repealed by the Criminal Code, or, if not, that they are unconstitutional, and that for that reason the bond is void. The lower court held that the sections of the statute referred to had been repealed, and dismissed the proceeding.

Held—That as this court can not reverse without passing upon the validity of the provisions of the statute referred to it has no jurisdiction of the appeal.

P. W. Hardin for appellant.

WALLACE v. COMMONWEALTH.

Filed November 12, 1886. Appeal from Calloway Circuit Court. Opinion of the court by Presiding Judge Bowden, dismissing.

Appeals in misdemeanor cases are granted upon condition that the transcript be lodged in this court within sixty days after the judgment.

As the judgment appealed from in this case was rendered May 19, and the record was not lodged here until July 20, more than sixty days had elapsed, and the appeal is dismissed.

G. A. C. Holt for appellant.

COMMONWEALTH v. MAYS.

Filed November 12, 1888. Appeal from Henry Circuit Court. Opinion of the court by Presiding Judge Bowden, dismissing.

Appeals by Commonwealth—No appeal lies from a judgment for the defendant in a penal case unless a fine exceeding \$50, or confinement exceeding thirty days, might have been inflicted.

P. W. Hardin for appellant.

GOOCH v. COMMONWEALTH.

Filed November 12, 1886. Appeal from Madison Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Criminal law—Sale of liquor—While proof of a sale of spirituous liquors will authorize a conviction under an indictment charging the sale of spirituous, vinous and malt liquors, proof of a sale of malt liquors alone will not authorize a conviction under such an indictment, since under the act of May 8, 1884, a license may be obtained to sell vinous and malt liquors which will not authorize the sale of spirituous liquors.

Parish & Crooke for appellant.

P. W. Hardin for appellee.

McCRORY v. COMMONWEALTH.

Filed November 12, 1886. Appeal from Marshall Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Local option—"Regular election"—A vote may be taken under the local option law at any regular election fixed by the Constitution or the general assembly; the words "at any regular town, city or county election," as used in the statutes, do not refer alone to elections fixed by the Constitution.

2. Allegation and proof—Variance—Where an indictment for a violation of the local option law alleged that the certificate of the examining board was spread on the order book at a certain term, and the proof showed that it was not done until a subsequent term, there was not a fatal variance in the allegation and proof. The allegation as to the time when the certificate was spread on the order book was not material, provided that the time fixed and proved was anterior to the time the accused is alleged and proved to have sold the liquor.

3. Local option—Evidence—Where an order of the county court directing the election to be held, and a certificate of the result are produced and found in substantial compliance with the requirements of the act, the only question open for inquiry is whether a majority of the legal votes cast in said election for and against the sale of liquors was cast against such sale; therefore, the court in this case properly excluded all evidence as to the publication of the notice of the election.

4. Physician may furnish liquor—The local option law does not prohibit a regular practicing physician from prescribing or furnishing in good faith liquors to his patients, just as he would any other medicine.

W. G. Bullitt and Gilbert & Reed for appellant.

P. W. Hardin for appellee.

CLARKE v. WARE, &c.

Filed November 15, 1886. Appeal from Bracken Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Partnership—Purchase on joint account—A contract whereby the parties agree to buy tobacco on joint account and to share equally the profit or loss, one of them undertaking to advance the money required and the other undertaking to perform personal service in buying, prizing and shipping the tobacco, constitutes a partnership.

2 Where a partner assigns his interest in the partnership, but by agreement with the assignee carefully conceals the fact from the other partner, continuing to discharge all of the duties which as partner he contracted to perform, the assignee has no equity whatever against the partner thus carefully deluded; nor should an assignee so conducting himself be preferred to a creditor of the assignor who has secured an attachment lien on the profits after the termination of the venture, and before any settlement has been made.

3. Priority of equities—While in a contest between equities the older prevails, yet it must be an equity, clean and presentable.

An assignment by a partner of his interest in the prospective profits of the partnership, if carefully concealed, does not constitute such an equity, and will not prevail over a lien acquired by an attaching creditor before notice to the other partner, or to any other person, of the assignment.

Richards & Hines for appellant.

H. P. Willis and H. C. Weaver for appellees.

WEBB v. L. & N. R. R. CO.

Filed November 15, 1886. Appeal from Henry Circuit Court. Opinion of the court by Judge Ward, reversing.

Railroads—Killing of stock—In an action against a railroad company for the value of stock killed by its cars, whether the statutory presumption has or not been overcome by the evidence is a question for the jury to determine and not for the court.

It was, therefore, error in this case for the court to instruct the jury that they must find for the defendant unless they believed from the evidence that the plaintiff's horse was seen on the track by defendant's servants in charge of the train, or could have been seen by the exercise of ordinary care in time to have prevented the injury.

Carroll & Barbour for appellant.

Wm. Lindsay for appellee.

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KENTUCKY COURT OF APPEALS.

CASEY'S ADM'R v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed April 22, 1886.)

1. Willful neglect—Servants in same grade of employment—The rule that where two servants are in the same field of labor and in the same grade of employment, the one not superior or subordinate to the other, neither can recover of his master for an injury caused by the neglect of his co-laborer, applies as well to an action under the statute for willful neglect as to a common law action for neglect.

2. What constitutes same grade of employment—Where laborers at work on a railroad in transporting dirt on small track cars a short distance alternately acted as brakemen, they were in the same grade of employment, and no recovery can be had of the company for an injury to one by the neglect of another, although the negligent laborer was at the time acting as brakeman and the injured laborer was not, the one being as much a brakeman as the other.

3. Special verdicts—New trial—Where there is no evidence to support a special verdict which, if supported by the evidence, would entitle the plaintiff to judgment, the court, instead of rendering judgment for the defendant, should grant a new trial.

This opinion, heretofore reported in abstract (7 Ky. Law Rep., 757, 759), has only recently been marked for publication.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Pryor.

In this case there was a motion by each party, plaintiff and defendant, for a judgment on the special findings. The motion in behalf of the defendant should have been to set aside the verdict because of the want of evidence to support it.

The findings by the jury, if true, entitled the appellant to a judgment, and if not true, entitled the appellee to a new trial.

The condition of the railroad track at the time of the accident had nothing to do with this case. The appellant was suing under the statute for damages on account of the death of his intestate, caused by the willful neglect of the railroad company, its agents and employes. The jury, by a special finding, said that the death was caused by the willful neglect of two of the brakemen, and assessed the damages at \$2,500. Upon such a finding the plaintiff was entitled to a judgment, and if there was no evidence to support the finding, instead of rendering a judgment for the defendant, the court should have set aside the verdict and granted a new trial. We see no distinction in a case of this character between a special and a general verdict. If there had been no special verdict, but a general verdict, and that verdict not sustained by the evidence, the motion for a new trial should have prevailed, and not a judgment for the defendant. So if the special verdict entitles the plaintiff to a judgment the court should set it aside, and award a new trial. It is only where the special findings entitle the one party or the other to a judgment that the court is authorized to render it.

There was no motion for a nonsuit, or if there was it did not prevail; but the case went to the jury, and that jury returned a special verdict that, if true, entitled the appellant to a recovery, and if not sustained by the evidence a new trial should have been granted; and no doubt the court in sustaining the motion based a judgment for the defendant on the ground that there was no evidence to support it.

The right of recovery in this case depended upon the relation the deceased sustained towards the parties, who are said by the jury to have caused, by their willful neglect, the death of the intestate. A number of laborers were at work on the railroad, including the intestate, in transporting dirt on small truck cars a short distance, and were under the control of Collier and Aiken as section bosses. The small cars had for brakes

rails that were inserted in a hole cut in the floor of the car, and when pressed against the wheel retarded the progress of the car. After loading the cars each one started off, the intestate on the first car and several others after him, on a down grade. The hindmost car seems to have run faster than the others, and running against the car next to it caused it to strike with force the front car, and the sudden jar knocked the intestate off his car, causing his death. The jury said the death was caused by the willful neglect of the brakemen on the hind cars. They were called on to apply brakes when the velocity with which the hind car approached was discovered; this they refused to do, and hence the injury. The only question in this case is whether the intestate and these brakemen were common laborers in the same line of service, and the one required to risk the contingencies produced by the want of skill on the part of the other. If the appellant's intestate is to be treated as a mere laborer on the road, and the two parties as brakemen in the exercise of such duties as pertain to that office on railroads, then the recovery for the death of the intestate may be properly based on the ground of willful neglect. The proof, however, in this case conduces to show that brakemen on these truck cars are not selected by reason of their skill or care, but of the number constituting these common laborers, any of them may get on the car, acting as brakeman, it being a duty pertaining to all, and a right that each one can and does exercise, going first on the one car and then on the other. The jury did not find that the section bosses started these cars in too close proximity to each other, but that the loss of life was caused by the neglect of the two brakemen; and from the proof the one laborer was as much a brakeman as the other. If so, the risk is taken by these parties in the same field of labor, and in the same grade of employment as to all injuries that may happen by the neglect of their co-laborers. In the *Louisville, Cincinnati & Lexington Railroad Co. v. Cavens' Adm'r*, 9 Bush, 565, it is said: "And it is equally as well established that where a number of persons contract to perform

service for another, the employes not being superior or subordinate, the one to the other, in its performance, and one receives an injury by the neglect of another in the discharge of this duty, they are regarded as substantially the agents of each other, and no recovery can be had against the employer.”

So if the discharge of this duty as brakeman on the truck cars was common to all, then we see no reason for a recovery in this case. The statute giving a remedy for the loss of life caused by the willful neglect of another, is but enlarging the common law rule, or providing a remedy unknown to the common law, but at the same time the doctrine of the text-books as to the liability of the employer for the acts of those in his employment, except as to the degrees of negligence, must prevail. To say that if the injury was caused by one in the employ of another in the exercise of that employment, the employer is liable regardless of the relation the wrongdoer and the injured party sustained towards each other at the time, is not the meaning or the purpose of the statute. The statute only gives a remedy for negligence causing the death of another that heretofore could not be maintained.

This is unlike the case of the L. & N. R. R. Co. v. Collins, 2 Duvall, 114. There the engineer of the train caused the injury to the common laborer, and on his skill and care the injured party had the right to rely.

As this case must be retried the judgment is reversed and cause remanded, with directions to set aside the judgment for the defendant and award it a new trial and for proceedings consistent with this opinion.

G. N. Robinson and Foree & Foree for appellant.

Bullock & Beckham for appellee.

COVINGTON GAS LIGHT CO. v. CITY OF COVINGTON, &c.

(Filed April 24, 1886.)

1. Taxation—Exemption of “machinery”—The provision in the charter of

a city exempting from taxation machinery in manufactories" does not exempt the pipes, lamp posts and meters of a gas company.

2. "Designation" by city council of taxable property—Under the provision in a city charter authorizing the taxation of such property as the city council "may designate," a designation of "any property of any kind subject to taxation under the laws of this Commonwealth" is sufficiently descriptive.

3. Sale of property of gas company for taxes—No portion of the property of a gas company can be seized and sold for taxes when the effect will be to destroy the public use. The chancellor, in a proper proceeding, can require the company, through its chief officers, to pay the taxes into court, or place the property in the hands of a receiver for that purpose.

4. Failure to tax—Estoppel—The failure of a city for many years to tax property can work no estoppel.

5. Distress for taxes—To preserve the right of distress for taxes under the provisions of the charter of the city of Covington the tax bills must be returned by the collector, and then to restore their efficacy must be sent out at least once a year by the council.

This opinion, heretofore reported in abstract (7 Ky. Law Rep., 768), has only recently been marked for publication.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Pryor.

This is an action by the Covington Gas Light Co. against the city of Covington, enjoining the collection of certain tax bills against that company on the ground that the property assessed is exempt from the payment of taxes, and if not, that the officer had no power to distrain the goods of the appellant for the taxes unpaid. Section 1 of the act to amend the charter of the city of Covington, approved April 9, 1873, empowering the council to levy taxes, etc., provides "that churches, school houses, colleges and the grounds attached thereto and dedicated solely for the use thereof, cemeteries, raw material held by manufacturers for the purpose of being manufactured in the city, machinery in manufactories," etc., shall be exempt from taxation.

The gas company owns real estate, upon which has been erected several buildings used for the purpose of manufacturing gas, with all the machinery and appliances attached for that purpose, and on this real estate, except the machinery, etc., the company has paid the tax. The question involved in this

case, the one at least of the greatest importance, is as to what constitutes the machinery for manufacturing gas, or the machinery in a gas manufactory. It is insisted, and was so adjudged by the court below, that the pipes leading from the realty, or factory of the appellant, by which, when the gas was made, it was conveyed to various parts of the city for the use of the inhabitants, was not a part of the machinery of a gas manufactory, nor were the lamp posts and meters embraced by the word machinery.

It is true that the pipes, lamp posts, etc., belonged to the gas company, and in one sense were attached to, or a part of, the main works, and are necessary to enable the company to perform its contract with the city and supply a public necessity. The right to lay down its pipes and to use the streets of the city for that purpose has been expressly granted under legislative authority; but with the pipes taken from the streets, or the meters and lamp posts removed, the manufacture of gas could still be carried on, not with much profit, however, unless the city furnished its own pipes, meters and lamp posts. The means of conveying the gas through the city is for the purpose of furnishing it to consumers, and not manufacturing it. The street railway is a franchise on the surface of the ground granted for the transportation of passengers, and the track that runs from its machine shops or that of the steam railway might as well be said to constitute a part of the machinery of the company as to hold that the franchise or pipes under the surface of the street, to enable the gas to be furnished in any part of the city after being manufactured, was a part of the company's machinery in its factory. Each company owns its franchise, but to adjudge that the pipes are part of the machinery in the factory, bringing them within the clause of the charter exempting it from taxation, would, at best, be a strained construction of the statute and relieve the company of a share of the public burden that other corporations as well as natural persons, equally as meritorious and with less profitable investments, would be compelled to bear. The entire city

of Covington would be converted into a workshop belonging in part, at least, to this corporation if its pipes, lamp posts and meters are to be held as machinery within its manufacturing establishment.

The tanks as well as all the machinery on the realty belonging to the company, and used for the purpose of making the gas, was properly exempt from taxation under the charter of the city; but the pipes, lamp posts, meters, etc., whether real or personal estate, was the subject of taxation, and not within the exemption. That the city may have failed to tax this property for years when making its assessments can work no estoppel; its neglect or want of diligence in ascertaining what property was liable to taxation can only affect the right of recovery when the statute of limitation operates as a bar, but no further, and if real or personal estate, the amount of levy being the same, no necessity exists for determining to which class of property it belongs.

A further provision of the first section of the amended charter authorized the levy "of an ad valorem tax on the real estate in the city, and on such personal estate, choses in action, and moneys within the city, or belonging to the inhabitants thereof as said city council may designate, and as now are, or from time to time may be, taxable by the laws of this Commonwealth," etc. It is argued that because this particular kind of property was not designated by the council as being subject to the payment of the tax, that, therefore, it was improperly assessed.

The designation made by the council in the year 1883 as to the property to be assessed was real estate, personal estate, debts, bills, bonds, etc., together with any property of any kind subject to taxation under the laws of this Commonwealth, etc., and the same designation made for the years 1881 and 1882, perhaps not quite so specific in its character. Either was sufficiently descriptive, and gave to the assessor full power to assess all the property owned by the inhabitants of the city, or located within the city, for the purposes of taxation, and to require the council to point out or name every species of prop-

erty so as to distinguish it from other property would be unreasonable, unless it could be assumed that the council or its members had taken an inventory of all the distinct kinds of property in the city. Such was not the meaning or purpose of the act, and why it was so worded is difficult to perceive, unless to make this law, like all other tax laws, more difficult of construction or of administering than any other general law.

This brings us to the consideration of another provision of the charter affecting the remedy for the collection of taxes when imposed.

The collector of taxes is required to make out a delinquent list by the provisions of the third section of article 5 of the act of 1850, and return it under oath to the council, and this must be done after the 15th of July and before the first Monday in August, and section five of the same article provides "that it shall be lawful for the council to place the delinquent lists or tax bills, from time to time, in the hands of the collector until they shall be collected, and the right of distress shall remain, if the same lists or tax bills are sent out at least once in each year, and the collector shall be liable for failing to collect and account for delinquent lists or bills in like manner as for original tax bills placed in his hands."

There is no reason for such a provision as this in the charter unless the object is to require a return of the tax bills by the collector, and then to restore their efficacy they must be sent out at least once a year by the council. Instead of making the right of distress exist for one, two, three or five years, or as long as the taxes remain uncollected, it was thought proper to insert this provision, that has the effect to confuse the provisions of the statute and make that doubtful which should and was susceptible of being made plain and easily understood. Exoneration from taxes arises from the multiplied and ambiguous statutes on the subject, and those unwilling to assume their share of the burden easily escape payment. The language of this section can not be misunderstood, and the right

of distress is gone except as to the period within which it may be adopted by reason of this plain provision of the statute.

This, however, is not a statute of limitation; the taxes may be collected by a suit in equity, and this is in fact the proper mode for so doing in a case like this under an express provision of the law applicable to the city of Covington conferring the jurisdiction upon the chancellor. The property of the corporation not used for or essential to supply the wants of the city and its inhabitants may be seized and sold for taxes, but the gas works proper and the pipes, lamp posts and meters, through which the entire city is furnished with light, must be, in this particular, regarded as an entirety, and no portion of it can be taken and sold when the effect will be to destroy the public use or deprive the public of the benefits to be derived from it. The wants of the public require and demand that this franchise, although granted to a private corporation, shall be devoted to the public use. The chancellor, in a proper proceeding, can require the company, through its chief officers, to pay the taxes into court or place the property in the hands of a receiver for that purpose. (Louisville Waterworks v. Hamilton, 81 Ky., 521.)

The property seized by the officer in this case, consisting of the office furniture and indispensable as is alleged for the proper execution of the contract with the city, should not have been ordered sold, but the relief adopted as already indicated.

The fact that the city would have been compelled to construct gas works, and if constructed the works would have been exempt from taxation, or that the city has reserved the right to purchase the works from the company, or that the company furnishes gas to the city for a less price than to private consumers, affords no reason for exempting this property from taxation. The chancellor, as we construe the judgment below as to all the property except the tanks, only perpetuated the injunction as to the remedy by distress, which is not final; but as to the tanks he perpetuated the injunction as to any attempt to collect taxes thereon, which is final. He has only

said as to the tax bills not returned to the collector by the council within the year the remedy by distress was improper.

It follows, therefore, that the pipes, posts and meters are liable to taxation, whether considered real or personal estate, but it also follows that the remedy for a distress is improper when the seizure of the property of the corporation will destroy the public use, and for that reason the judgment below is reversed, with directions to restrain the city from selling the property levied on, so framing the judgment as to show that the remedy adjudged is alone withheld, leaving the city to proceed, if it sees proper, in some other mode for enforcing payment. In all other respects we concur with the views expressed in the judgment appealed from.

The cause is remanded for proceedings consistent with this opinion. Reversed on original and affirmed on cross appeal.

No constitutional question was raised or decided in this case as to the right of exemption.

J. F. & C. H. Fisk for appellants.

W. K. Benton for appellee.

BARNETT v. COMMONWEALTH.

(Filed November 11, 1886.)

1. Prejudicial instructions—Every improper instruction is *prima facie* prejudicial to the accused, subject to be shown otherwise by the evidence in the case.

2. Instructions—Suggestions as to false testimony—An instruction to the jury that "if they believe that any witness or witnesses have willfully sworn falsely as to any material fact, they may, if they deem proper, disregard the entire testimony of such witness or witnesses," is erroneous, and such an instruction was in this case prejudicial.

Appeal from Union Circuit Court.

Opinion of the court by Judge Holt.

Upon the trial of the appellant, Charles Barnett, for malicious shooting and wounding, the following instruction was given over his objection:

"The jury are the sole judges for themselves of the weight

of the testimony and credibility of the witnesses, and may attach such weight to any and all parts thereof as they may think proper; and if they believe that any witness or witnesses have willfully sworn falsely as to any material fact they may, if they deem proper, disregard the entire testimony of such witness or witnesses."

Theoretically this is all true, and yet this court has repeatedly condemned such an instruction because it in effect invades the province of the jury.

By section 225 of the Criminal Code it is made the duty of the court to instruct the jury on the law applicable to the case. When it has done this it has fully discharged its duty; and by implication it is forbidden from suggesting to the jury how they shall consider the testimony or the weight to be attached to any particular part of it, or any isolated facts. If it can do so at all there is no limit to the power. If it may tell them that one class of evidence should be closely scrutinized, why may it not say to them that it should be discredited?

Save in the case of *Jump v. The Commonwealth* (MS. opinion, May 31, 1884), perhaps this court has never reversed a judgment of conviction for this error; but it has not been because the instruction was not improper, but because under the particular circumstances of the case under consideration the accused had not been prejudiced by it.

Here the testimony is very conflicting as to whether the accused is the person who did the shooting. The witnesses in his behalf are, with one exception, nearly related to him; and there are some contradictions and discrepancies in their testimony.

Under these circumstances the instruction *supra* would naturally be understood by the jury as an intimation from the court that in its opinion the witnesses, or some of them, had sworn falsely; and such an opinion, coming from the court, could but have an undue influence upon the jury, and prevent them from freely passing upon the guilt or innocence of the accused upon the entire testimony.

In a case like this, to assume that the instruction was not prejudicial can be nothing more than supposition; and it should not be indulged where the life or liberty of the citizen is involved. The correct rule, we think, is that every improper instruction should be taken as *prima facie* prejudicial to the accused, subject of course to be shown otherwise by the evidence in the case.

Whether the facts necessary to constitute guilt have been shown by the evidence is a question to be determined by the jury; and this they should do, uninfluenced by any suggestion from the court as to the weight of any particular species of evidence, otherwise their province as triers of the facts is invaded.

Under our present system of instructing the jury, instead of charging them, they should be left to weigh the evidence and draw from it their conclusion as to guilt or innocence, without comment upon it by the court. No undue prominence should be given to any particular phase or class of testimony by the trial judge, nor should he confine the minds of the jury to any particular channel of thought in the consideration of the entire testimony. They should not be limited by any particular test of credibility; nor, as was done in this instance, should a certain conclusion, depending upon a single fact, be singled out, and the jury told that they are at liberty to adopt it. It is true that they may do it; but undue prominence should not be given to it by the court, and their minds thus made to incline to it. It is in effect saying to them that, in the opinion of the court, something is wrong, and your attention is called to it to guard you from imposition.

Upon the other hand, the jury should be left entirely free as to the extent of their belief, or the mode of weighing the testimony or considering any class of witnesses.

These views are supported by the cases of *Jump v. The Commonwealth*, *supra*; *Cook v. Commonwealth*, 4 Ky. Law Rep., 31; *Berry v. Branham*, 3 Ky. Law Rep., 756; *Brady v. Commonwealth*, 11 Bush, 282.

The instruction is also objectionable because the jury are told that if they believe any witness has sworn falsely to any material fact, they may disregard his entire testimony, thus leaving them to judge of the materiality of the testimony.

For the error indicated the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Cissell & Dudley and W. F. Berry for appellant.

P. W. Hardin for appellee.

HEILMAN v. COMMONWEALTH.

(Filed November 13, 1886.)

1. Rape—Presumption as to capacity of boy under fourteen—The law presumes that a boy under fourteen years of age is incapable of committing a rape, but that presumption is not conclusive.

2. Presumption as to criminal capacity of children—By the common law a child under seven years of age is conclusively presumed to be incapable of the commission of crime, but between the ages of seven and fourteen this presumption is only *prima facie*.

3. It is the duty of the trial court in a criminal case to see that the whole law of the case is given to the jury.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Holt.

Under an indictment for the rape of a child under twelve years of age the appellant, George Heilman, has been convicted and sentenced to the penitentiary for ten years for carnally knowing a child under that age. The evidence tends strongly to show that he was between eleven and twelve years of age at the time of the alleged commission of the offense. The jury were in substance told that a boy over fourteen years of age is presumed in law to be capable of the act, but incapable if under that age; but if they found from the evidence that appellant was at the time under that age, and yet physically capable of the act, then they should convict him of rape, if done with force; and if not, then of carnally knowing.

the child. No instruction whatever was given upon the question whether he at the time had discretion and mind enough to know the wrongful character of the act.

By the common law a child under seven years is conclusively presumed to be incapable of the commission of crime. Within that age he is absolutely presumed to be *doli incapax*; between seven and fourteen he is so only *prima facie*, and the maxim applies, *malitia supplet aetatem*. In the latter case his criminal mental capacity may be shown; and the question is whether there was a guilty knowledge of wrongdoing. The age of fourteen years is known under the common law as that of discretion; but by it if it appears that an infant under that age, but over seven, has mind to distinguish between good and evil, as if a child twelve years old kill another and then hide the body, he is liable to conviction. In such a case it must be left to the jury to say whether the accused did the act, and if so, whether he had a guilty knowledge of it; and the intent, instead of being inferred, as in the case of one over fourteen years of age, must be proven.

Indeed it has been said by perhaps the most eminent common law writer: "The evidence of that malice which is to supply age ought to be strong and clear, beyond all doubt and contradiction."

The presumption in his favor when under seven years of age is indisputable; but it is reasonable that from that time until he arrives at the age of discretion that the presumption in his favor should diminish.

It is, however, a rule of the English common law that a boy under fourteen is conclusively presumed to be incapable of committing a rape, the malice not supplying the age as to it as in other crimes. This doctrine has been adhered to in some of the States, and under it no evidence is admissible to show that the accused has in fact arrived at puberty, and could commit the offense. It is, therefore, urged in this case that the jury should have been peremptorily instructed to acquit the accused.

This rule, however, is but an arbitrary one, and must often allow the knowingly guilty to escape punishment. It can not, therefore, be said to be the perfection of reason, and in this country, with its diversity of race, climate and condition, all affecting human development, it should be rejected; and evidence that the accused is under fourteen should be held only to raise a presumption of his incapacity, is subject to be overthrown by testimony.

Certainly one who has positive capacity to commit the crime and acts understandingly should not be allowed to escape punishment, even if to do so requires a departure from a long-established rule.

The English rule, however, proceeds upon the ground of impotency rather than discretion, because an infant under fourteen may under it be convicted of aiding in the offense. It is there based upon their observation and experience as to their own social life, race and condition. Their climate, condition and habits vary from ours, and their population is mostly composed of the same race; and it is well known that in the cold countries of Northern Europe it is almost invariably the case that an infant under fourteen years of age is incapable of this offense. For this reason it may perhaps be said that the rule there is supported by reason. In this country, however, it is different. In the first place we know it to be a fact that with us the male often arrives at puberty before the age of fourteen, and to exempt him from punishment when he has knowingly violated the law would not only be in the face of the statute itself, but subversive of the proper regard due to it, and of a social condition to be sacredly cherished and upheld.

But further than this we know that climate, race, habit and condition in life largely influence the physical condition. With us there is great diversity in all these respects, and it follows, therefore, that the arbitrary English rule is not applicable to our condition. With us, instead of being founded on reason, it would contradict both it and fact; it could hardly be said to be approximately true; and, worse than all, it would

suffer a criminal class to walk among the unsuspecting and virtuous, with no fear or regard for the law, thus sapping the very foundation of our social structure.

Law must conform to the fact and to the condition to which it applies; and the reason of the English rule failing, the rule itself must fail.

These views are supported by the cases of *People v. Randolph*, 2 Parker, C. C., 174; *Williams v. The State*, 14 Ohio, 222; *Hiltabiddle v. The State*, 35 Ohio, 52.

It was proper to instruct the jury that if they believe from the evidence that the accused was under fourteen years of age when the alleged offense was committed, that then the law presumed him to be incapable of it; but if from the evidence they believed, beyond a reasonable doubt, that he was physically capable, that then this presumption could not prevail. The court should, however, have submitted to the jury by a proper instruction the question whether he had mind and discretion sufficient to discern between good and evil, and to know the wrongful character of the act. They should have been told that if they believed from the evidence that he was under fourteen years of age at the time of the alleged commission of the act, that then the law presumes that he did not know it was wrong; and that this presumption entitled him to an acquittal unless they were satisfied from the testimony that he was then aware of the wrongful character of the act and of his legal responsibility for it. It is the duty of the trial court to see that the accused has a fair trial. It must see, therefore, that the whole law of the case is given to the jury; and for its failure to instruct the jury as above indicated the judgment is reversed and cause remanded for a new trial consistent with this opinion.

Thos. E. Ward for appellant.

P. W. Hardin for appellee.

McMURTRY v. KENTUCKY CENTRAL R. R. CO.

(Filed November 18, 1886.)

1. Interest on judgments—A judgment for an “injury to the person,” whether it arises *ex contractu* or *ex delicto*, does not carry interest.

2. Railroads—Failure to transport passenger safely—Form of action—One who has been injured through the negligence of a railroad company while a passenger on a train, under a contract with the company to transport him safely, can sue either in *assumpsit* for a breach of the contract, or in case for the neglect of a duty based upon the contract, and the plaintiff in this case having such an election of remedies, the court is inclined to the opinion that the facts set forth in his petition as constituting a contract were stated merely as inducement, and that the gravamen of the action was the tort or violation of duty by the company.

3. Recovery of money paid under mistake—One who has, under a mistake of law and fact, and without consideration, and not as the result of a compromise, paid money to another, which was not owing in law or conscience, may recover it back.

The appellee having paid interest on a judgment which did not carry interest is allowed to recover it back.

Appeal from Harrison Chancery Court.

Opinion of the court by Judge Holt.

The appellant, Frank McMurtry, obtained a judgment against the Kentucky Central Railroad Co. for a personal injury, resulting from the negligence of its employes in the management of one of its trains upon which he was a passenger.

His attorney asked the company by letter if it desired to pay it without an execution, offering, in such an event, to furnish a statement of the amount. An affirmative answer being returned, he did so, and in it embraced interest upon the judgment from the date of its rendition, amounting to \$1,491.06. By its terms the judgment did not bear interest. Payment being delayed, the attorney again notified the company by letter that an execution would issue in the event of nonpayment, and thereupon payment was made in accordance with the statement. It now seeks to recover back the interest upon the ground that it was paid through mistake of law.

If the appellant, McMurtry, had no right to it, and payment
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was made by the company under a mistaken belief to the contrary, then, upon the facts presented, neither good morals nor law sanction its retention by him. It is clear that it was not the result of a compromise of a doubtful claim, nor was there any agreement to pay interest in consideration of a delay of execution. Where the parties regard a question of either law or fact as doubtful, and to avoid litigation, and by way of compromise, payment is made, then no recovery can be had; but in the case now before us no question was raised at the time as to the right of the claimant to interest; and if in fact he was not entitled to it, then it is manifest that it was paid under a mistake of law and without consideration; and not being due, either in law or conscience, the law will not allow him to retain it. This rule is so well settled in this State that it is no longer a question whether a recovery can be had where money has been paid without consideration, either under a mistake of law or fact, and which was not owing in law or conscience, nor the result of compromise. (*Underwood v. Brockman, &c.*, 4 Dana, 310; *Ray, &c. v. Bank of Kentucky*, 3 B. M., 513; *City of Covington v. Powell*, 2 Met., 228; *City of Louisville v. Henning & Speed*, 1 Bush, 388.

The question raised in limine being disposed of, we will now consider the main one in the case, and which involves the construction of a statute not hitherto considered by this court.

Section 6, chapter 60 of the General Statutes, provides: "A judgment, except for malicious prosecution, libel, slander or injury to the person shall bear legal interest from its date."

It is urged that this action is one *ex contractu* and not *ex delicto*, and that the words in the statute, "injury to the person," should be confined to those purely of the latter class, or where the complaint is for trespass *vi et armis*.

In view of our opinion upon this point it is unnecessary to determine the character of the action in which the judgment was obtained. As distinguished counsel, however, have discussed it elaborately, we will notice it briefly.

The inquiry would be whether the averments of the petition

constitute an action ex contractu for a breach of the contract to transport the passenger safely, or one ex delicto for a violation of its duty as a common carrier. It is often difficult to determine by the averments of a petition whether, under the common law system of pleading, the action would have been classed as in assumpsit or in case. The line often becomes quite shadowy. The one must, and the other may, arise out of a contract. In the first-named character of action the promise is the gist of it; while in the other the neglect of duty is the gravamen of the claim. In either form of action the right of the one party and the liability of the other is based upon the contract. The duty owing arises from it, and the obligation, for the breach of which the party may complain, rests upon it. An action upon the case in its broadest meaning included assumpsit as well as an action in form ex delicto. More generality in pleading was allowed in it than in other forms of action.

Chitty on Pleadings, volume 1, page 152, says:

“Where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach.”

In Hutchinson on Carriers, section 794, it is said:

“In many cases the contract is stated as the inducement or consideration from which the duty results, the breach or neglect of which is complained of, and the tort or wrong arising from such breach or neglect of duty is the gravamen of the action. In such cases the action will be treated as in case and not in assumpsit.”

Under our present system of pleading, however, the substance of the pleading, and not its form, must determine the

character of the action. Here the injured party had a choice of remedies. He could sue either in the form of *assumpsit* for a breach of the contract, or in case for the neglect of a duty based upon the contract; and while it is not free from doubt, yet we incline to the opinion that the gravamen of the action was the tort or violation of duty by the company; and that so much of the petition as sets forth facts constituting a contract were stated merely as inducement, and to show that the appellant was where he had a right to be when he was injured, or at least that such is their legal effect. We are sustained in this view by the fact that the petition contains a second paragraph, identical with the first, save it seeks the recovery of punitive damages by averring that the injury was caused by the gross negligence of those in charge of the train. Such damages of course could not be recovered in an action for the breach of a contract; and while the recovery was, after the evidence had been heard, confined to compensatory damages, yet it is evident that it was not restricted to the damages that had been suffered up to the time of the judgment, but that it included not only damages for the physical and mental suffering that had been endured, but for the permanent "injury to the person."

But granting that the action was *ex contractu*, does it follow that the judgment should have carried interest? We think not. The statute prohibits it where it is for an "injury to the person," whether arising *ex contractu* or *ex delicto*. Both forms of action are alike for the personal injury. The language is plain, and we see no reason for restricting it to cases of tort. In fact the history of the country shows, to our mind, that it was not so intended. It is urged that this is not true; and that upon the contrary it shows that the word "injury" as used is synonymous with the word "tort." Let us see.

At common law judgments do not carry interest. The first innovation upon this rule was the act of 1812, (2 M. and B. Statutes, page 855) by which it was provided that if the collection of a judgment for money, founded upon contract, was de-

layed by proceedings by the defendant and then affirmed, it should bear interest from the time of its rendition. This law was construed in *Young v. Pate*, 3 J. J. M., 100, to apply to all judgments save those arising ex delicto. Thus the law remained until 1837 (3d Loughborough's Statutes, 280), when the legislature provided that all judgments should bear interest save in "actions of malicious prosecutions, libel and slander, and actions of tort to the person." This was the rule until the adoption of the Revised Statutes (volume 2, page 65) in 1852. During this interval railroads had been built in the State, thereby creating a fruitful source of personal injuries, both ex contractu and ex delicto.

The law was then changed thus: "A judgment, except for malicious prosecution, libel, slander or injury to the person, and a decree shall bear legal interest from its date;" and this has been the rule ever since.

We fail to see any reason why the word "injury" in the present law should be restricted in meaning, and held equivalent to the word "tort" as used in the act of 1837. The legislation on the subject, taken according to its plain language, seems consistent with the progress of invention, and the consequent liability to personal injury; and even if this were not so, yet the language of the law is too plain to admit of such a construction. The legislature meant something by the use of the words "injury to the person" in the present law, instead of the word "tort," as they found it in the then existing statute. The latter word was the proper one to use if they intended no change.

It is also urged that the words "injury to the person" should be restricted to injuries vi et armis, because in such cases the law by a *capias ad satisfaciendum* affords a summary way of enforcement; that there is, therefore, a reason for not allowing interest; and that the one provision of the statute should be considered in construing the other. This argument, however, fails because a judgment for a trespass to property carries interest, and yet the statute allows a *capias* for its enforcement.

If the legislature had intended merely to provide that a judgment for a personal injury vi et armis should not bear interest they could easily have said so in unmistakable language. If they intended only to say that a judgment for a tort should not carry it, why did they alter the language of the then existing law, which was brief and expressive?

Our conclusion is that the statute means what it so plainly says: That no judgment for an "injury to the person," whether it arise ex contractu or ex delicto, carries interest.

Judgment affirmed.

J. Q. Ward and L. M. Martin for appellant.

Hargis & Eastin and O'Bryan for appellee.

JOHNSON & CO., &c. v. CONNECTICUT FIRE INS. CO., &c.
LANCASHIRE FIRE INS. CO., &c. v. JOHNSON & CO., &c.
(Filed November 20, 1886.)

1. Insurance—Executory contract—To establish an executory contract of insurance it must appear that an agreement to insure was in fact entered into, and that nothing essential to a complete agreement was left open for future determination; and the burden is on the party attempting to establish such a contract to establish it by a preponderance of the evidence.

In this case the insured, who had insurance in several companies, some of which had expired, told the agent representing these companies that he wanted insurance to a certain amount, and that if the insurance remaining did not amount to that much he wanted the difference made up in renewals or new policies. By a mistake of the agent, or of both the agent and the insured as to the policies still in force, the insured obtained only one-half the insurance desired. Held—That there was no contract for the renewal of the policies which were not in fact renewed, and that the companies in which the additional insurance would have been taken but for the mistake are not liable either by contract or estoppel.

2. Plaintiff having failed to file a reply should be allowed to do so upon the return of the case.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

W. S. Johnson & Co. were engaged in buying and handling tobacco in their stemmery in the city of Owensboro, Ky. On

the 26th day of August, 1880, this stemmery, together with a large quantity of tobacco, was destroyed by fire. They brought suit in the Daviess Circuit Court against the Lancashire, Phoenix, Springfield, Franklin, Lorillard, Liverpool and London and Globe and Imperial and Northern Insurance Companies, and the Insurance Company of North America, claiming that they, at the time of said fire, held actual insurance, and a parol contract for insurance, in said companies for \$16,400 on said tobacco; that said insurance was for the benefit of Sherley & Glover, who had advanced them the money with which they purchased said tobacco, except the insurance in the Franklin Insurance Co. for \$1,000, which was for the benefit of farmers who had tobacco in said stemmery, and the insurance in the Insurance Company of North America, which was for the benefit of the Deposit Bank of Owensboro.

The Franklin Insurance Company and the Insurance Company of North America ended the litigation, as far as they were concerned, by paying the sums claimed against them.

The lower court rendered judgment dismissing the petition of W. S. Johnson & Co. as against the Connecticut, the Lorillard, the Liverpool and London and Globe, and the Imperial and Northern Insurance Companies.

W. S. Johnson & Co. have appealed from said judgment.

The lower court rendered judgment against the Lancashire, the Phoenix, and the Springfield Insurance Companies for \$2,000 each, with interest from December 1, 1880. From said judgment they have appealed.

The appeal of W. S. Johnson & Co. against the Connecticut Insurance Co., &c., will be disposed of first.

The appellants, W. S. Johnson & Co., prior to the 24th of August, 1880, had been in the habit of insuring their tobacco in the Connecticut, the Lorillard, the Liverpool and London and Globe, the Imperial and Northern, the Springfield, the Lancashire and the Phoenix Insurance Companies. The insurance in each was usually \$2,000. Owing to the fact that

said tobacco was to be shipped to market as fast as it could be prepared the insurance was taken out for short periods of time, and renewed, from time to time, as occasion required. John Wandling was the local agent at Owensboro for all these companies, and with him appellants contracted for said insurance.

Mr. Cottrell, one of the members of appellants' firm, swears that on the 24th of August, 1880, his attention was called to the fact, by John Wandling, that the insurance on his tobacco was running low by reason of some of the policies having expired, and suggested that they be renewed. That he then informed Wandling that he desired as much as \$12,000 insurance on his tobacco, and if the insurance remaining on it did not amount to that much, he desired the difference made up by renewals or new policies; that he did not know how much insurance there then was on the tobacco, or how much had expired, which he informed Wandling; and told him that whatever amount the actual insurance on the tobacco fell short of \$12,000 he desired renewals, or new policies, issued sufficient to make the whole amount of insurance as much as \$12,000; that Wandling, also professing not to know how much insurance there then was on the tobacco, looked at his book to ascertain the amount, and reported the policies on the tobacco in the Imperial and Northern, the Connecticut, the Lorillard, and the Liverpool and London and Globe Insurance Companies, for \$2,000 each, as alive and in force; that he, Cottrell, knowing nothing to the contrary, and relying on said statement as true, agreed with Wandling that he should give him additional insurance for \$4,000 on the tobacco, both believing, from the investigation made by Wandling that said sum would make \$12,000 in all insurance on the tobacco; that Wandling did, within a day or two thereafter, deliver to appellants policies in the Lancashire and Phoenix Insurance Companies for \$2,000 each.

Cottrell also swears that it was the agreement between appellants and Wandling that Wandling was to select for them the companies in which he would insure them.

On the other hand, John Wandling swears that on the 24th of August, 1880, Cottrell came to his office and wished to know how much insurance he had on his tobacco; that he took him to his book and read over to him the name of each company in which he had insurance and the amount of each policy as it appeared on the book, giving the expiration of each; that Cottrell was looking with him in the book; that it appeared from said reading that the policies in the four insurance companies above named, for \$2,000 each, were alive and in force; that the policy in the Lancashire for \$2,000 had expired on the 21st of August, 1880; and that the policy in the Phoenix expired that day, the 24th of August, 1880; that Cottrell then said renew the policies in the Lancashire and Phoenix for \$2,000 each, which he, Wandling, agreed to do, and they were issued that day and delivered the next day. Wandling also says that there was nothing said about \$12,000 insurance, or enough insurance to make \$12,000.

J. C. Wandling swears that he was present while said book was being examined. As to what occurred during that time, and immediately after, he corroborates John Wandling.

It turned out, on investigation a day or two after the fire, that it was a mistake about the policies in said four companies being alive and in force on the 24th of August; that all of them had expired before then, which left the policy for \$2,000 in the Springfield Insurance Co., which was alive and in force on the 24th day of August, 1880, and the two renewed policies in the Lancashire and the Phoenix for \$2,000 each, as all of the insurance evidenced by written policies that appellants had on said tobacco at the time of the fire.

The appellants' contention amounts to this: That as they and Wandling believed that the policies in the said four companies for \$2,000 each were alive and in force, and as it was

understood by Wandling that they desired as much as \$12,000 insurance on said tobacco, to which he was agreed, which sum they, as well as Wandling, believed by taking the additional policies in the Lancashire and Phoenix for \$2,000 each they would obtain; and as Wandling made the mistake about there being policies alive and in force in said four companies for \$2,000 each, whereby they only obtained, together with the policy already in force in the Springfield Insurance Co. for \$2,000, policies for \$6,000 on said tobacco, the said companies, appellees, are liable to them as on a verbal contract of insurance for the remaining \$6,000, or are estopped to deny their liability for that sum.

Presuming that Cottrell and John and J. C. Wandling were equally veracious in testifying as to their recollection of the transaction of the 24th of August, 1880, we are nevertheless constrained to believe (judging by the rules of weighing evidence) that the transaction was substantially as the two latter recalled it. Be that, however, as it may, the evidence of Cottrell himself fails to establish a cause of action against the appellees.

It is certain that the parties, on the 24th of August, 1880, made no contract of insurance--that is, an executed contract, evidenced by written policies in said companies—for \$12,000 on said tobacco.

Also, we think that the parties made no contract to insure in said companies—that is, an executory contract—for \$12,000 on said tobacco.

The latter kind of contract, usually existing in parol, must be established by the same class of proof required to establish any other contract. It must be shown that a complete contract was made; that an agreement to insure was in fact entered into, and that nothing essential to a complete agreement was left open for future determination. The burden is on the party attempting to establish such a contract to establish it by a preponderance of evidence.

Here, on the 24th of August, there was no contract made to insure with appellees' companies. The contract was with the Lancashire and the Phoenix alone for \$2,000 each in their companies. The appellants and the appellees, it is true, thought that appellants had a live and enforceable contract of insurance in appellees' companies for \$8,000, which turned out to be a mistake. Appellants and appellees' agent were both responsible for the mistake, or the agent alone; the fact nevertheless exists that no contract was made to renew the policies in appellees' companies.

Upon what principle then can appellants hold appellees responsible? Is it upon the principle that because appellants and appellees thought that appellants had a live contract of insurance in appellees' companies, about which they were mistaken, and for that reason, probably, did not make a contract, therefore, the court should make a new contract for them? This we can not do. Had a contract been actually made to insure appellants in appellees' companies for \$8,000, which by mistake was not done in accordance with the agreement, then the court could correct the mistake and enforce the contract according to its terms. But the mistake consisted in not making a contract. We, therefore, have no power to make one at the instance of appellants over the objection of appellees.

As to the question of estoppel the appellees, by their agent Wandling, made to the appellants no promise to renew said policies, nor induce them to believe that they would renew the risk in their companies. Nor was appellees' agent alone responsible for the mistake in supposing that appellants' policies were still alive in their company. Cottrell also examined the book with Wandling; besides, he had good opportunity to know from other sources when said policies would expire. The mistake was mutual, and as much the fault of Cottrell as Wandling. Therefore, the rule of estoppel does not apply.

As to the appeal by the Lancashire Insurance Co., &c., against W. S. Johnson & Co., the evidence as to the quantity

and value of the tobacco consumed by the fire, while somewhat unsatisfactory in some particulars, clearly preponderates in favor of the fact that said tobacco was worth largely more than the aggregate amount adjudged against the appellants by the lower court.

It appears from the record before us that the appellant, the Springfield Insurance Co., filed a separate answer to appellees' petition, in which it was distinctly alleged that appellees, in their sworn preliminary statement of loss by the fire, made willfully untrue and fraudulent statements of the quantity and value of the tobacco destroyed by the fire, etc., which, by the terms of the policy, rendered it void. Appellants failed to reply to this answer. Under the Civil Code the answer must, therefore, be treated as true. The case, therefore, as to the appellee, the Springfield Insurance Co., must be reversed. But as the proof was taken and heard as to the quantity and value of the said tobacco, which tended to show that if appellants made any misstatements of fact in their preliminary oath and proof of loss, they were innocently made, the lower court, therefore, will, upon the return of the cause, allow the appellants a reasonable time in which to file a reply to said answer, if they desire to do so, and then hear the case as to said appellee upon its merits. If they do not file said reply within a reasonable time, then the action as to said appellee must be dismissed.

The judgment of the lower court dismissing the petition of appellants, W. S. Johnson & Co., against the appellees, the Connecticut Insurance Co., &c., is affirmed. The judgment against the appellants, the Lancashire and Phoenix Insurance Companies, is affirmed. The judgment against the Springfield Insurance Co. is reversed and the cause remanded as to it for further proceedings consistent with this opinion.

Weir, Weir & Walker for Insurance Companies.

G. W. Jolly for Johnson & Co., &c.

KENTON INSURANCE CO. v. BOWMAN, &c.

(Filed November 11, 1886.)

1. Corporations—Lien on stock—Where the charter of a corporation provides that stock may be transferred on the books of the company, but that no transfer shall be made by any stockholder indebted to the company until his debt is paid or secured, the company has a lien on the stock, which is a legal one, and can not be defeated by the transfer of the stock except in the manner pointed out in the charter.

2. Waiver of lien—Accepting other security—A corporation does not waive its lien on stock by taking a mortgage on other property to secure the indebtedness unless it clearly appears that there was an intention to waive the lien.

3. The executive officer of a corporation whose duty it is to transact its general business with third persons binds the company by his acts done within the scope of the general usage, practice and course of business of the corporation.

In this case the officer of a corporation who had no power to transact the general business of the company with third persons did not bind the company by his certificate to the effect that the company had no lien on certain shares of stock.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Bennett.

On the 21st of October, 1874, V. Shinkle and his wife, Lydia A. Shinkle, executed to the appellant a mortgage on a tract of land belonging to his wife, Lydia A. Shinkle, to secure a note executed by them to appellant for the sum of \$24,886, and payable three years after date, with 7 per cent. interest, payable semi-annually.

V. Shinkle was president of the Kenton Insurance Co., the appellant, from the time of its organization under its charter by an act of the legislature of this State, approved the 13th of February, 1867, until sometime in 1884, and owned a large amount of its stock at the time said note and mortgage were executed.

On the 15th of August, 1883, V. Shinkle executed to the appellees, W. M. Finley and R. T. Miller, a deed of assignment of all of his property for the benefit of his creditors, he having become insolvent.

In 1883, but prior to his deed of assignment, V. Shinkle pledged to the First National Bank a certificate for some

shares of stock which he owned in the Kenton Insurance Co., the appellant, to secure a loan or loans of money made by the bank to him.

In 1880 and 1883, but before the deed of assignment, V. Shinkle pledged to the Northern Bank certificates for some other shares of stock which he owned in the Kenton Insurance Co. to secure loans of money made by that bank to him.

He also pledged to the German National Bank of Covington a certificate for some shares of stock which he owned in the Kenton Insurance Co. to secure a loan or loans made by that bank to him.

On the 7th of September, 1883, the appellant brought suit in the Kenton Chancery Court against Lucy M. Bowman, her husband, and others, the children of V. and Lydia A. Shinkle, and also the assignees of V. Shinkle, to enforce its mortgage lien on said land, and have it sold to pay the remainder of said debt.

On the 1st of October, 1883, the assignees of V. Shinkle brought suit in the Kenton Chancery Court to sell the lands assigned to them for the purpose of paying the debts of V. Shinkle.

The appellant, by an amended petition, claimed a lien on the stock which V. Shinkle owned in its company, including that pledged to the bank, to secure said debt of \$24,886, or the remainder of it, in addition to its mortgage lien upon said land.

The banks above mentioned, by their separate answers, contest the right of appellant to a lien on the stock pledged to them upon the grounds:

1st. That appellant under its charter has no lien upon the stock of V. Shinkle to secure his indebtedness to it.

2d. That if appellant ever had a lien under its charter to secure the said indebtedness, it waived said lien by taking a mortgage on said land, which they contend was ample security to secure the payment of said indebtedness.

3d. That they loaned V. Shinkle said sums of money, and received the stock as a pledge for the payment of it, upon the

verbal and written assurance of appellant that it had no lien or claim upon said stock.

The assignees also insist that appellant has no lien upon any of the stock owned by V. Shinkle in its company.

The children of V. and Lydia A. Shinkle by their answer insist that appellant's charter gave it a lien upon the stock of V. Shinkle; and that said mortgage was executed in view of that lien and with the understanding that the stock was ample security for the payment of said debt; and that the mortgage was required as a mere matter of form to satisfy the demands of the insurance bureau of the State; and that, therefore, said stock should be first applied to the payment of the mortgage debt.

The first question is, does the appellant's charter give it a lien on the shares of stock owned by the stockholders in their own right to secure the payment of their indebtedness to the company?

The 10th section of appellant's charter provides: "That the stock of this institution may be assigned and transferred on the books of the company in person or by power of attorney; but no stockholder indebted to the company shall be permitted to make any transfer or receive any dividend until such debt is paid or secured to the satisfaction of the president and board of directors."

The Supreme Court of the United States, in the case of Union Bank v. Laird, 2 Wheaton, 396, construed the 11th section of an act of Congress, passed the 18th of February, 1811, incorporating the "Union Bank," which section provided: "That the shares of the capital stock at any time owned by any individual stockholder shall be transferable only on the books of the bank, according to such rules as may, conformably to law, be established in that behalf by the president and directors; but all debts actually due and payable to the bank * * * by a stockholder, requesting a transfer, must be satisfied before such transfer shall be made, unless the president and directors shall direct to the contrary." The certificate issued to Patton

for fifty shares held by him declared "the shares to be transferrable at said bank by the said Patton, or his attorney, on surrendering this certificate."

The court said: "No person, therefore, can acquire a legal title to any shares, except under a regular transfer, according to the rules of the bank; and if any person takes an equitable assignment it must be subject to the rights of the bank under the act of incorporation, of which he is bound to take notice. The president and directors of the bank expressly deny that they have waived or intended to waive the right of the bank to a lien for debts due to the bank by the form of the certificate, and that they ever directed any transfer to be made to Patton which should stipulate to the contrary. Under such circumstances it must be held that the shares are responsible for the debts due the bank."

In the case of the Mechanics Bank, &c. v. Seton, &c., 1 Peters, 299, the 21st section of the act chartering the bank provided "that the shares of the capital stock shall be transferrable at any time, according to such rules as may be established by the president and directors; but no stock shall be transferred, the holder thereof being indebted to the bank, until such debt be satisfied, except the president and directors otherwise order it." The court said: "This provision was intended to put into the hands of the bank additional security for debts due from the stockholders."

In the case of Brent v. The Bank of Washington, 10 Peters, 614, in which the court construed a provision of the bank's charter, which was similar to the provision quoted in the Union Bank v. Laird, supra, it was said: "As Mr. Brent owed the debts now claimed by the bank on the notes due and protested before his death, this would be a complete answer to a suit at law by his executors for not permitting a transfer; and the same objection would be fatal to a suit in their name for the use of the United States. The defense is a legal one; the case provided for by the charter and by-law had happened. The bank had a perfect right to hold on to the stock."

Again, on page 615, the court said: "Two notes were due and protested; the legal lien of the bank for their payment was complete."

Again, on the same page, the court said, in reference to the note not due, "though the charter has not made the note a lien on the stock till the note is protested, so as to give the bank both a legal and equitable right to refuse the transfer till it is paid, yet it has given them the power to prevent a transfer, unless on their books, by such rules as they may prescribe, which gives them power to prevent the legal title from passing to a purchaser."

In the case of the National Bank v. Watson town Bank, 15 Otto, 220, the court construed section 10, article 10 of an act regulating banks, which reads: "But no stockholder indebted to the bank for a debt actually due and unpaid shall be authorized to make a transfer or receive a dividend until such debt is discharged, or security to the satisfaction of the directors given for the same." The court said: "The title, however, was unquestionably subject to the lien given by its charter to the Watson town Bank."

The court in this case decides that the transfer of the certificate of stock passed the legal title to the stock to the transferee, subject, however, to the lien of the bank upon it for the payment of any debt the transferor might owe the bank at the time.

In the case of Union Bank v. Laird the court held that the transferee of the certificate of stock acquired only an equitable title to the stock until the transfer was entered upon the books of the bank. Both cases, however, as well as the other cases referred to, agree that the lien of the banks, by virtue of the provisions of their charters above quoted, existed not merely as an implied, but as a legal lien upon the shares of the stockholders who were indebted to the banks for the payment of such debts.

According to these cases we conclude that by the 10th section of appellant's charter it has a lien upon the stock held in

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its company by the stockholders thereof to secure the payment of any debt that such stockholder may owe it; and that such lien is a legal one, and can not be defeated by the simple transfer of the stock, except in the manner pointed out by the section supra and the by-laws of the company.

The second contention is that the appellant waived its lien upon the stock of V. Shinkle by taking the mortgage on Mrs. Shinkle's farm to secure his indebtedness to it, which farm secured the payment of the indebtedness, as is contended, to the satisfaction of the appellant.

In the case of Union Bank v. Laird the court said: "The next inquiry is whether the bank has done anything to deprive itself of the lien upon the shares for the acceptance of Patton since the same became due, and to let in the equitable title of the plaintiff. The acceptance is not yet paid, and nothing has been done by the bank affecting its rights unless the subsequent taking of security for the acceptance from Smith can be construed so to do. Certainly the bank had the right to require additional security from the endorser of the acceptance, and it can not be perceived upon what principle this can be construed an extinguishment of its lien upon the shares of the acceptor. A creditor may lawfully take and hold several securities for the same debt from his joint debtors, and he can not be compellable to yield up either until his debt is paid. And in this case there is no want of equity in holding the shares of Patton, who is the immediate debtor to the bank, liable in the first instance, rather than resorting to the security of an endorser, who is only liable upon the default of the acceptor."

The proof in this case shows that Mrs. Shinkle was induced to execute the mortgage upon her land to the appellant upon the assurance of Mr. Beal, its secretary and cashier, that the stock held by V. Shinkle in appellant's company was sufficient to secure the payment of his indebtedness to it, therefore, she would run no risk in executing the mortgage. The proof also shows that from the time said mortgage was executed until

after the assignment of V. Shinkle to his assignees the dividends from time to time declared on said stock were applied to the payment of the interest on said mortgage debt.

It is true that the appellant in making its reports to the insurance bureau of the State always reported the land mortgaged to be worth largely more than said debt; also the appellant's special committee appointed for the purpose always reported that said debt was amply secured by said mortgage. But how these facts can be construed as a waiver of appellant's lien upon the stock we are unable to perceive. The appellant's lien upon V. Shinkle's stock as a security for the payment of his indebtedness to it was a legal lien, and of as high dignity as its lien acquired by the execution of the mortgage for the security of the debt. Having the legal right to the one lien and the contract right to the other, it had the right to look to both as a security for the payment of the indebtedness. The presumption is that it did look to both. The fact that it regarded the mortgage security as equivalent in value to the debt does not destroy that presumption. In order to destroy that presumption some affirmative fact should appear, showing expressly, or by clear implication, that appellant intended by taking the mortgage security to waive its lien on the stock. Such fact does not appear. On the contrary the appellant held out as an inducement to the execution of the mortgage that it held a lien on said stock, which was sufficient security for the payment of said debt; also it, from year to year, applied the dividends arising from said stock to the payment of the interest on said debt.

For the foregoing reasons we conclude that appellant did not waive its lien on said stock by taking the mortgage security.

The third contention of the banks is that V. Shinkle transferred some of the certificates of stock held by him in the appellant's company as collateral security for the several sums borrowed from them; and that appellant waived its lien on said stock so pledged to them, and, in consideration of the

pledge of the stock and waiver of lien on it by appellant, they loaned V. Shinkle said sums of money.

The banks put in evidence the written certificates and verbal statements of T. E. O. Brooks, assistant secretary of appellant's company, made to them, as proof of such waiver of appellant's lien on said stock.

One of the certificates is as follows:

"Covington, March 24, 1881.

"To whom it may concern:

"This is to certify that V. Shinkle is the owner and proprietor of certificate No. 150, for twenty-five shares paid-up capital stock of the Kenton Insurance Co., amounting to \$1,-250, and this company has no claims against the same.

"KENTON INSURANCE CO.,

"T. E. O. Brooks, Ass't Sec'y."

This certificate was delivered to one of the banks, and a similar certificate was delivered to another of the banks, and similar verbal statements were made to all of them in reference to the certificates for the shares of stock held by the banks as collateral security for the loans to V. Shinkle.

Whether Mr. Brooks, as an officer in appellant's company, had the authority to bind it by these statements may be elucidated by a reference to the authorities bearing upon the subject.

This court, in the case of the bank of America v. McNiel, 10 Bush, 59, says: "By section 24 of the by-laws of this bank the cashier is made a member of the exchange committee. This committee is charged with the duty of buying and selling bills, notes and other evidence of debts, and of discounting paper offered to the bank for discount. Nothing to the contrary being shown, it must be presumed that the cashier was present when the two notes of Atwood were passed upon. He was then acting for the bank in the discharge of his official duties. It was his duty to have disclosed to the members of the committee the facts known to him."

In the case of the Connecticut Mutual Life Insurance Co. v.

Scott, &c., 81 Ky., 540, this court said: "Information coming to the officers elected by the board, and intrusted with the daily transaction of the business of the company and those who deal with it, and which is necessary or naturally connected with its performance, and which such officers are in duty bound to disclose to the board, must be treated as the information of the board, and binding upon it. Notice, therefore, to such agents in the transactions in which they are employed is notice to the company employing them."

In the case of the National Bank v. Watson town Bank, *supra*, the court said: "The clause which denies to the stockholder the privilege of making a transfer of his stock, while the debtor, until his debt is discharged or secured to the satisfaction of the directors, does not forbid the bank to waive its rights or prevent the cashier from acting for the directors, by virtue of an express or implied authority. In this, as in other matters of ordinary business within the general scope of his official duty, he is their appropriate representative."

From the foregoing authorities, and others not necessary to cite, the rule seems to be that the executive officer of a corporation, whose duty it is to transact its general business with third persons, is impliedly held out to the world as having authority to act according to the general usage, practice and course of business of said corporation; and all acts done by him within the scope of such usage, practice and course of business bind the corporation as to third persons who transact business with him on the faith of his official character, although it may turn out that he acted without the knowledge or consent of the corporation, and against its interest, and in violation of his duty to it.

The evidence in this case shows that Mr. Brooks was not a member of the board of directors, nor was it his official duty to act with them at their meetings, nor to advise them as to the condition of the company, or as to its business transactions; nor did he have power to transact the general business of the company with third persons. He says it was his duty to keep

the books of the company, and handle its money and valuables, and do such other work as was required of him. He does not recollect to have given certificates similar to those given to the banks but to one or two persons. He claims to have inferred his authority to give such certificates from the habit of the former secretary, Mr. Beal, to give such certificates. It turns out, however, that he can recollect only a few instances in which Mr. Beal gave such certificates; and he had no authority to do so, nor did Mr. Brooks. It is also clearly shown that the company, or its board of directors, knew nothing of the acts of either Beal or Brooks in this regard, and did not approve or ratify such acts.

We conclude, therefore, that Mr. Brooks had no authority, either express or implied, by virtue of the official position he held in appellant's company, to give the certificates mentioned; nor were his acts in that regard known to the company or ratified by it. Nor were his general official duties such as to justify appellee's belief that in giving said certificates or in making the verbal estimates he was acting within the scope of his authority; nor were the appellees justified in believing that, by reason of the position which Brooks actually held in the company, giving his authority incidental thereto the most liberal construction, he had any authority, either express or implied, to give such certificates. Besides, the certificates of stock transferred to the banks by V. Shinkle say the stock "is subject to all claims of the company against the owner." The appellees, the banks, therefore, had notice of the appellant's claim upon said stock to secure any debt that the owner might owe it at the time of the transfer. They, presumptively at least, knew that appellant, by the terms of its charter, had a lien on the stock of V. Shinkle for any debt that he might owe it. It was incumbent on them, therefore, to apply to the proper authority to ascertain whether said stock was unencumbered, and not confine their inquiry to one whose official duties in the institution were, at most, merely clerical. Besides, the officers of the banks who transacted this business

were, or had been at sometime, stockholders or officers in appellant's company, and doubtless knew—certainly should have known—that Brooks had no authority to issue such certificates. After giving the entire record a careful consideration, we conclude that the appellant has a superior lien on the stock in question, except that portion hereinafter mentioned; and that said stock, together with all of the stock owned by V. Shinkle, should be sold upon such terms as the lower court may prescribe, and the proceeds thereof applied to the payment of said mortgage debt of \$24,886. And after said credit is given, so much of the said land mortgaged as may be sufficient for that purpose should be sold to satisfy the remainder, if any, of said debt. Said debt should be credited also with the value of the stock redeemed by the assignees of V. Shinkle from the Northern Bank. The said assignees should be allowed to retain out of the proceeds of said stock the money and interest thereon which they paid to the Northern Bank for the redemption of said stock, and the balance of the proceeds arising from the sale of said stock should be paid to the appellant. The Northern Bank should not be held liable to the appellant on account of the said stock transferred to the assignees of V. Shinkle.

The judgment is reversed and the cause remanded, with directions to the lower court to proceed consistently with this opinion.

J. F. & C. H. Fisk for appellant.

Hallam & Myers, O'Hara & Bryan, Collins & Fenley, A. C. Ellis, R. P. Ernst and Wm. Goebel for appellees.

FENNESSEY v. FENNESSEY.

(Filed December 7, 1886.)

Husband and wife—Conveyance in contemplation of marriage—A conveyance by the husband before marriage, in contemplation thereof, will not be set aside for the purpose of giving the wife dower if the intention of the grantor was to provide for his children by a former marriage, and not to de-

fraud the wife, the advancement or gift being reasonable when considered with reference to the property owned by the grantor.

In this case the promises of the grantor to his former wife to execute the conveyances, and his continued purpose to do so, are considered as circumstances showing his good faith.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

This action was instituted in the Kenton Chancery Court by the appellant, Alicia T. Fennessey, against James E. Fennessey and others, to recover dower in certain houses and lots in the city of Covington alleged to have been owned by her husband in his lifetime, and conveyed by him to his children by a former wife in fraud of her marital rights.

John Fennessey was married to the appellant on the 24th of September, in the year 1867, and three days before the marriage conveyed the houses and lots in which dower is claimed, of the value of \$9,000, to three of his children by his first wife, who are the present appellees.

This is the second time the case has been in this court, the first appeal presenting the question alone as to the sufficiency of the petition, to which a demurrer had been sustained. Upon that appeal the judgment was reversed.

John Fennessey married his first wife, Angeline Demaris, in the year 1855. She was then the owner of a millinery establishment, and her husband owned a small stock of dry goods, their joint fortune not exceeding \$1,500.

After the marriage her business was transferred to the store of her husband, in which she took an active part and sometimes the absolute control, and in nine or ten years they accumulated an estate worth \$100,000, and we might add that much of their success in business is to be attributed to the skill and industry of the wife. When her health began to fail she often insisted upon her right to have her husband secure to her children some part of the estate, and his promises to do so were as frequent as her demands.

They had four children, and prior to his wife's death he

conveyed to his youngest child, Angeline, a house and lot; this was in 1864. After his wife's death he often spoke of his purpose to comply with his wife's wishes, and even before her death had designated the particular houses, except the one for his son William.

The intention of the father to convey these lots seems never to have been abandoned, but the deeds were not in fact executed until a few days prior to his last marriage.

It is insisted by counsel for the appellant that any conveyance without consideration to children or others by one party pending a marriage treaty, on the eve of its solemnization, without the knowledge or concurrence of the other party, is actual and positive fraud, that admits of no explanation or exception, and, therefore, all the proof as to the claims of the first wife and her children upon the husband's bounty, connected with the proof as to the value of his estate, can in no manner affect the decision of this case.

In this view of the question presented we can not concur.

The general doctrine laid down by counsel is often found in the text-books as well as the reported cases, but upon an examination of the elementary rules on the subject it will be found that such transactions are only *prima facie* fraudulent and void, and the reported cases canceling such conveyances make the fraudulent intent with which they are made the question to be determined by the jury or the court, and the parties holding under the deed may show that no fraud was intended or practiced on the party complaining.

If one, when about to consummate a marriage contract, should make a voluntary conveyance of his estate, or the greater portion of it, to his children, without the knowledge or consent of the wife, the conveyance would doubtless be of such a character as to make the charge of fraud conclusive to the mind of the chancellor, but to hold that from every conveyance voluntarily made by the intended husband or wife lessening the value of the interest that the one might have in the estate of the other by reason of the marital relation, arises

a conclusive presumption of fraud, would often work great injustice and defeat bona fide conveyances made by those whose legal and natural duty requires them to provide for the maintenance and education of their children.

A distinction is attempted to be drawn by some of the authorities between conveyances made by the husband on the eve of marriage and those made by the wife, the authorities holding that while a conveyance secretly made by the wife on the treaty of marriage is *prima facie* fraudulent, it might not, under similar circumstances, be held fraudulent if made by the husband. This doctrine is based on the ground that the consummation of the marriage burdens the husband with the wife's support, and makes him liable for her debts. (Bright's Husband and Wife, volume 1, page 357; Countess of Strathmore v. Bowes, 1 Vesey, Jr., 22.)

It is not necessary that we should follow or adopt such a doctrine, and in the consideration of this case will regard the marital rights of the one as sacred as those of the other.

This court said, when the case was here, that "the facts alleged made out a *prima facie* case, and if facts existed rendering the conveyances valid, those facts must be pleaded."

The promises made by the husband to his first wife to execute these several conveyances, and his continued purpose to do so, can not defeat the claim to dower of the present appellant, if the deeds were made with the fraudulent purpose of depriving the appellant of dower in this realty, and such testimony is admissible for the purpose only of showing that the conveyances were made in good faith; and, if so made, must be held valid, although their legal effect is to bar the appellant's right of dower.

If the property conveyed constituted the bulk of the husband's estate, or was such an advancement to his children as was unreasonable when compared with the value of his entire property, we should have no hesitation in adjudging the conveyances fraudulent as to the wife. The testimony on the part of the appellees conduces to establish that in 1867, when this second marriage took place, the husband's estate was of the

value of \$70,000 or \$80,000, and on the part of the appellants, that it was of the value of \$40,000 or \$50,000, and by the commissioner that he sold the realty in the settlement of the estate to pay debts for \$39,000.

After the second marriage the husband and father was unfortunate in business, unhappy in his marriage relation, became reckless and dissipated, and wasted nearly the whole of his estate.

The second wife (appellant) brought nothing to the common fund, and we see no reason why the father, with not less than \$50,000, could not make advancements to his children by his first wife amounting to \$9,000. He doubtless thought it best to execute the deeds before the existence of the potential right of dower by his second wife, but this act was not fraudulent, although made in contemplation of his second marriage. It was not done to prevent the wife from the enjoyment of his estate, or to deprive her of such an interest in it as she might reasonably have expected upon becoming his wife.

That the appellant regarded the realty as belonging to the husband may be conceded, but it can be scarcely argued that if informed of the conveyances she would have declined to enter into the marital relation.

Adams on Equity, in treating of the right of a woman to convey away her property after the contract of marriage has been entered into, says "that it is for the court to determine in each case whether, having regard to the condition of the parties and other attendant circumstances, a transaction complained of by the husband should be held as fraudulent." (Adams on Equity, page 406.) Bigelow on Fraud, in discussing the same principle, says that the burden of impeaching the validity of the conveyance rests on the husband if he objects to it. "The mere nondisclosure of an antenuptial conveyance would not of itself render the transaction impeachable by the husband, nor when provision was made by a widow for

the children of a former marriage would the deed be invalid. The equity which arises in cases of this nature depends upon the peculiar circumstances of each case as bearing on the question whether the facts do or do not amount to fraud upon the intended husband." (Bigelow on Fraud, page 51.)

In this State the substance of the decisions are that for the husband before marriage to convey the whole or the greater portion of his estate away without the knowledge of the wife is a fraud on her rights, and this view is sustained by the weight of authority; and it may also be regarded as settled that where any such voluntary conveyances are made without the knowledge of one of the contracting parties it presents a *prima facie* case of fraud, subject to be explained by the parties interested, and the burden is on the grantees to establish the validity of the deed. We find no case establishing the proposition that a deed or conveyance made by the husband or wife, at the time possessed of an ample fortune, by which their children by a former marriage have been vested with the title to a reasonable portion of the estate, and such as a father or mother in their pecuniary condition might reasonably advance to their children, is fraudulent as to the contracting party not informed of the conveyance prior to the consummation of the marriage contract.

To hold that such advancements can not be made that are reasonable, looking to the condition of the father's estate, would prevent any *bona fide* alienation or advancement by him to his children by a former wife, and require that he should hold his entire estate, except from purchasers for value, that his intended wife may assert her inchoate right of dower. The actual purpose or intent to defraud must appear, and when made in good faith such a settlement upon the children as was made in this case by the father will be sustained by a court of equity.

All the cases cited by counsel, from *Thayer v. Thayer*, 14 Vermont, 107, to *Reynolds v. Vance*, 1 Heiskell, 344, show a disposition by the husband of all or nearly the whole of his estate, with circumstances attending the transaction that show a plain case of fraud.

Mr. Story in his work on Equity Jurisprudence, volume 1, section 273, says that a secret conveyance made by a woman in contemplation of marriage to her separate use will be held void, and in derogation of the marital rights of her husband, or a conveyance in favor of a person for whom she is under no moral obligation to provide. "But," says the author, "if one only reasonably provides for her children by a former marriage under circumstances of good faith it would be otherwise."

Where the intention is to provide for the children and not to defraud the wife, and the advancement or gift is reasonable, when considered with reference to the property owned by the donor or grantor, the chancellor will uphold the transaction; and after a careful review of the facts in this record we are satisfied that no such facts are presented as will authorize the chancellor to disturb the conveyances made that the wife may obtain dower.

Judgment affirmed.

Simmons & Schmidt for appellant.

Benton & Benton and L. J. Blakely for appellee.

COMMONWEALTH v. YARBROUGH, &c.

(Filed December 2, 1886.)

1. Sheriff's bond—Sureties—In no case can the sheriff postpone the execution of his revenue bond longer than the first Monday in January, whether the bond is for the first or second year of his term, and unless the bond is accepted by the court within the time fixed by the statute it is void. Nor can the court extend the time for the execution or acceptance of the bond by making no adjourning order, and continuing its session from day to day.

2. Parol proof to contradict record—The sureties of the sheriff may show by parol proof that the bond was executed on a day other than that which the record recites.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Bennett.

The appellant proceeded by motion in the Franklin Circuit Court under article 11, chapter 92 of the General Statutes,

against W. A. Yarbrough, sheriff of Graves county, and the appellees as his sureties, to obtain judgment on his revenue bond for the year 1882.

W. A. Yarbrough, sheriff, did not resist the motion, and the Franklin Circuit Court rendered judgment against him for the amount claimed by the Commonwealth.

The appellees by their answers contested the right of the appellant to recover from them the amounts claimed on several grounds, among which was that the bond was not taken on or before the first Monday in January, 1882, but was taken and approved by the county court on Tuesday, the 3d day of January, 1882. Therefore, they contend that the bond thus taken was void and not binding for that reason on them. The Franklin Circuit Court sustained the plea of the appellees, and dismissed the motion as to them.

The appellant has appealed to this court.

The following facts are clearly established by the exhibits and proof in the case:

1st. By the record of the county court it appears that said bond was taken and approved on Monday, the 2d day of January, 1882.

2d. The evidence in the case clearly shows that on Monday, the 2d day of January, 1882, W. A. Yarbrough, as sheriff, together with a portion of the appellees, appeared in the county court and signed said bond—Yarbrough as principal, and said appellees as his sureties—and tendered the same to the county court for acceptance and approval; that the court refused to accept or approve said bond because it was not, in the opinion of the court, sufficient security for the collection of the revenue for the year 1882; that W. A. Yarbrough then sent his deputy to the country, with a written power of attorney, to obtain the signatures of the other appellees thereto, authorizing the clerk of the county court of Graves to sign their names to said bond as the sureties of W. A. Yarbrough; that on Tuesday, the 3d day of January, 1882, said deputy presented the names of said signers to the power of attorney to the county

court, and their names were signed to said bond on that day by the clerk of the court. Thereupon, and not until then, the county court accepted and approved said bond. Is the bond void by reason of its acceptance and approval on Tuesday, the 3d day of January, 1882?

The General Statutes, chapter 92, article 8, section 3, provides that "the sheriff shall, on or before the first Monday in January next succeeding his election, and annually thereafter, enter into bond, with surety, for the collection of the revenue and public dues. He may execute bond and qualify at any time after he receives his certificate of election, up to and including the first Monday in January next succeeding his election; and it shall be the duty of the judge of the county court to hold a court at any time the sheriff may request for that purpose. The county court shall judge of the sufficiency of the surety," etc.

Under this provision the sheriff may, at any time after he receives his certificate of election, but not later than the succeeding first Monday in January, execute the bond required of him as sheriff and qualify as sheriff. If he elects to execute bond and qualify as sheriff before the first Monday in January next after his election, then he must annually thereafter execute a new bond for the collection of the revenue. If he elects to execute bond and qualify on the first Monday in January next after his election, then he must annually, on the first Monday in January thereafter, execute a new bond for the collection of the revenue. He may acquire the right to execute the bond annually before the first Monday in January by executing his first bond, and qualifying after his election before the first Monday in January next succeeding his election, but in no case can he postpone the execution of said bond longer than the first Monday in January, whether the bond is for the first or second year of his term. The first Monday of January is the "ultima thule" of his right to execute the bond and of the authority of the county court to accept it. The section *supra* also provides that "the county court shall judge of the

sufficiency of the surety, and in no case shall sureties be taken who are not jointly worth," etc. The court must take the bond and judge of its sufficiency. The bond, with a portion of the sureties whose names appear to it, was tendered on Monday, the 2d day of January, 1882. Had the bond been accepted that day by the court it would have been a valid bond; but it was not accepted that day. The evidence shows that it was rejected that day because of the insufficiency of the sureties, the very thing the court was to judge of. On the next day the bond was signed by additional sureties. Then, for the first time, the court adjudged that the bond was sufficient. It was then, for the first time, accepted; down to that time the bond had no vitality, no legal existence. It remained in the custody of the officers of the court as a mere escrow. Even if the bond had been signed and tendered on the 2d of January by a sufficient number of sureties to make it acceptable to the court, and the court had acted in the premises that day, the bond would have been accepted; but as the court did not in fact adjudge that day that it was sufficient and accept it as the revenue bond of the sheriff for the ensuing year, it was, as just said, no bond. It could not become a bond of binding force, indeed of any force at all, until the court had adjudged it sufficient, and accepted it as the sheriff's revenue bond for the ensuing year.

As the power of the county court to take the revenue bond of the sheriff exists alone by statutory authority, and as the statute prescribes the time in which such bond shall be taken, and as such bond, although tendered and partially signed within the time fixed by the statute, has no binding force until adjudged sufficient and accepted by the county court within the time fixed, it follows that the action of the county court in taking the bond in controversy not within the time fixed by the statute was without authority, and the bond is, therefore, void. (*Calloway v. The Commonwealth*, 4 Bush, 383; *Fletcher v. Light, Barrett & Co.*, 4 Bush, 303; *Hall, &c. v. The Com-*

monwealth, &c., 8 Bush, 278; Basham, &c. v. The Commonwealth, 13 Bush, 36; Lowe v. Phelps, 14 Bush, 642.)

The fact that the county court may continue its session from day to day, and by signing the adjourning order only on the last day make its session but one day, did not authorize the county court in this case to take the bond on Tuesday. The statute fixed Monday as the last day in which the bond could be made and accepted by the court. If the county court could by this legal fiction make Tuesday Monday, so as to comply with the terms of the statute, which fixed Monday as the last day on which the act could be done, then by the same legal fiction it might have continued its session in the same way until the 30th of January, and made that day Monday for the purpose of taking the bond.

The power of the county court to continue its session from day to day for the purpose of transacting business and make its session only one day, relates to the transaction of such business as it may lawfully do on any of those days, and not to the transaction of such business as the statute requires to be done on a particular day or within a given time.

The fact that the record of the county court shows that the bond was accepted and approved by the county court on the first Monday in January, 1882, does not prevent the appellees from showing by proof, aliunde, that the recital of this jurisdictional fact in the record is false. This court, in the case of *Gilbert v. Bartlett*, 9 Bush, 49, says: "The county courts of this State are courts of limited jurisdiction, and derived all their power from some express statutory provision." Also in the case of *Jacob's Adm'r v. L. & N. R. R. Co.*, 10 Bush, 263, this court says in substance that a county court having no jurisdiction over certain subjects, except in cases where certain essential and indispensable facts exist, the rule is that such facts conferring jurisdiction must appear in the record. So we see that the county courts of this State are inferior courts of record, and of limited statutory jurisdiction. And in cases like the one before us their jurisdiction is specially limited by stat-

ute, both as to the time and manner of proceeding. Also their official acts in such cases are ministerial, and not judicial. It has been repeatedly held in this country, by courts of the highest authority, that the recitals in the proceedings of inferior courts of record, whose power and jurisdiction are created and limited by statute, or whose acts are merely ministerial, of facts necessary to give them jurisdiction, is *prima facie* evidence that the jurisdiction exists; yet that the facts thus set forth may be disproved and the proceedings avoided by extrinsic and parol evidence.

The appellees in this case could not have appealed from the order of the county court, nor could they have moved that court, after its final adjournment of that term, to correct the date of its order. So to deny them the right, when sued upon the bond, to attack the date of the order and show its falsity would be to subject them to heavy burdens, for which the truth, if permitted to come to light, would show they were not bound.

The judgment of the lower court is affirmed.

P. W. Hardin, Attorney-General, and E. W. Hines for appellant.

Wm. Lindsay, Trice & Park and Hugh Rodman for appellee.

KING v. GRAHAM.

(Filed November 23, 1886.)

Fraudulent conveyances—Limitation—Where land conveyed to the wife is sought to be subject to the husband's debts upon the ground that it was purchased by the husband and wife with money originating from land paid for by the husband and fraudulently conveyed to the wife, limitation runs from the date of the original fraudulent conveyance, and the action is barred after the lapse of ten years from that date, the creditor having no greater right than he would have had if the wife had continued to hold the land originally conveyed to her.

Appeal from Fleming Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant in this case is complaining of the judgment

below because he was denied the right to subject the land of the wife to the payment of a debt due by the husband that had been reduced to judgment, and return of no property found.

In the year 1870 a conveyance was made by Jacob Teager to Mary Graham, the wife of the debtor, to a tract of land, containing thirty acres, for the consideration of \$3,358. The husband and wife sold that land and invested part of the proceeds in other lands, having the deed made to the wife, and continued to sell and reinvest until March, 1882, when they invested \$1,600 of the money, the proceeds of land conveyed to the wife, in a small tract of land purchased of one Simms. This last tract of land the appellant sought to subject on the ground that it was purchased with money belonging to the husband, originating from the conveyance made to the wife in 1870 by Jacob Teager, it being alleged in the petition of appellant that the money to pay for that tract of land was furnished by the husband, and the conveyance made to the wife by the vendor in fraud of the rights of creditors, and that the proceeds of that tract of land had been invested and reinvested as already stated. The husband and wife deny the fraud, and rely also on the five and ten years' statutes of limitation.

The conveyance sought to be cancelled, so far as it affects the appellant, whose debt existed prior to the year 1870, is not claimed to be fraudulent, unless the conveyance made to the wife by Teager in 1870 was fraudulent. The right to subject the land conveyed to the wife by Simms depends on the effect of the conveyance made by Teager. If that deed was fraudulent, the wrong was perpetrated in 1870, and the statute of ten years will bar any recovery; and the investments made from the sale of that land during the period intervening between that date and the date of the deed from Miller will not be held to be independent transactions, so as to sever them from the effect of the Teager deed in 1870, that the statute of limitation may be avoided. The entire transaction must be treated as stated in the petition of appellant, from which it appears that the fraud was perpetrated in the year 1870; and that in-

vestments continued to be made from time to time by the wife can have no greater force, so far as they affect the rights of the wife, than if she had continued to hold the land originally purchased of Teager. The 6th section of article 3, title "Limitation of Actions," General Statutes, page 632, provides: "That no action for relief for fraud or mistake shall be brought ten years after the time of making the contract, or the perpetration of the fraud." This statute is a bar to the relief sought, and the judgment is affirmed.

W. H. Cord for appellant.

M. M. Teager for appellee.

CHENAULT, RECEIVER, &c. v. BUSH.

(Filed December 7, 1886.)

1. Contribution—Set-off—In equity the obligation of one co-obligor to contribute to another in the event the latter pays more than his part of the joint debt springs up at the time the relation of co-obligors is entered into, and not when the payment is made, the right being simply consummated then. Therefore, where, after the joint undertaking is entered into, but before its maturity or payment, one of the co-obligors makes an assignment for the benefit of his creditors, and the other afterwards pays the joint debt, the latter may, in an action against him by the assignees on a note executed by him to the assignor, his co-obligor, set-off the latter's aliquot part of the joint debt. The rule, however, would probably be different if the action were by an assignee for value.

2. Execution lien—Failure of consideration—Where property for which a note was executed was afterwards levied on and sold under an execution from the circuit court against the vendor, which was in the hands of the sheriff at the time the obligor in the note purchased the property, there was a failure of consideration for the note.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

On the 18th of December, 1882, J. G. Williams and W. D. Stevenson, as partners, trading under the firm name of Williams & Stevenson, sold to the appellee, V. W. Bush, several pieces of property. Appellee executed to the said firm several notes for said piece of property, due and payable at short intervals of time.

Among the property thus bought were four mules, four sets of harness, one log wagon and chains, at the price of \$590, for which appellee executed his note, due and payable thirteen days after date.

Shortly after this transaction, and before the maturity of any of said notes, Williams & Stevenson, both as a firm and as individuals, made a deed of assignment of all of their property to assignees, in trust for the benefit of their creditors.

The assignees accepted the trust, and brought suit to the February term of the Clark County Common Pleas Court for the purpose of settling the said estate, and distributing the proceeds among the creditors of the assignors.

At said term of court the appellant was appointed receiver to collect all accounts, notes and choses in action due the firm of Williams & Stevenson.

On the 7th of March, 1883, the appellant, as receiver, brought suit in the Montgomery Circuit Court against the appellee, in which he sought to recover judgment on the above-mentioned notes.

The appellee contested the appellant's right to recover on the note of \$590 upon the ground of a failure of consideration, which consisted in the fact that, at the time of the purchase of said mules, harness, etc., the sheriff of Montgomery county held in his hands an execution, which was alive and in full force, in favor of R. C. Robinson, and against the firm of Williams & Stevenson, which execution created a lien on said mules, harness, etc., they being at the time in Montgomery county, prior and superior to the right of appellee as purchaser of said property; and that said prior and superior lien, by virtue of said execution, was enforced by the levy, seizure and sale of said property to satisfy said execution lien.

The execution having been issued from a circuit court, created a lien as soon as it came to the hands of the sheriff of Montgomery county, upon all of the property subject to execution in said county belonging to Williams & Stevenson, which

lien was superior to the appellee's acquired right to said property by purchase from Williams & Stevenson.

The proof is clear that at the time of appellant's purchase of said property it was in Montgomery county, and that said execution was in the hands of said sheriff, alive and in full force; and that the property was, after the purchase, levied on and sold to satisfy said execution.

The lower court, therefore, sustained the plea of a failure of consideration, and relieved the appellee from the payment of said note. In this the court did right.

The appellee pleaded a set-off of \$6,000 against the other notes sued on by appellant. Issue was joined on this plea.

The proof shows that the firm of Williams & Stevenson, as a firm, entered into partnership with appellee, under the firm name of J. G. Williams & Co., for the purpose of buying walnut lumber, the firm of Williams & Stevenson representing one-half interest and the appellee the other half interest; that they purchased a large lot of walnut lumber from one Davis; that for the purpose of taking up the notes which they had executed for the price of said lumber they, on the 5th of October, 1882, executed to the Clark County National Bank a note due and payable four months after date for \$12,353.75, which note was signed by the firm of Williams & Stevenson by J. G. Williams and the appellee; that on the 24th of February, 1883, the appellee, with his own money, paid off said note in full, and took an assignment of it from the bank to himself. The foregoing facts are clearly established by the proof as it appears in the record before us.

The sum pleaded as a set-off by appellee consists of one-half of the amount he paid in taking up said note.

The note at the time of the assignment by Williams & Stevenson was not due, nor was it paid off by appellee until after said assignment and the acceptance of the trust by the assignees, but was paid off before the appellant, as receiver,

instituted suit against appellee on the notes executed by him to Williams & Stevenson.

The appellant contends that as Williams & Stevenson, at the time of their assignment for the benefit of creditors, were not indebted to appellee on account of their joint liability with him on said note to the bank as co-principals, his subsequent payment of said liability in full and with his own money was not an available set-off, either at law or in equity, of one-half of the amount so paid, against the notes sued on by appellant, because said Williams & Stevenson only became indebted to appellee for one-half of said liability from the time he paid it to the bank, and at the time of said payment the title to said notes had passed to their assignees in trust for the benefit of their creditors.

The appellant, in support of this view, cites several cases, among which is *Walker v. McKay*, 2 Met., 294.

The facts of that case were, that Caroline Walker held a note on J. B. Walker, which, being due, she assigned to McKay for value. J. B. Walker was immediately notified of the assignment. He was subsequently compelled to pay a note on which he was bound as the surety of Caroline Walker. She was insolvent not only at the time of the assignment, but also at the periods when both notes were executed. J. B. Walker pleaded the sum so paid as a set-off against the note assigned by Caroline Walker to McKay.

The question actually decided by the court in that case was that as McKay was an assignee of the note on J. B. Walker for value, and as J. B. Walker had notice thereof, and had not paid the note on which he was bound as the surety of Caroline Walker at the time of the assignment and notice, he could not plead the amount subsequently paid in discharge of said note as a set-off against the note given by him to Caroline Walker in the hands of her assignee for value. The other cases cited by counsel for appellant decide the same principle. The arguments adduced in support of the principle, it is true, mean something more, but by them we are not bound.

But these cases do not meet the question here. The question here is, where one insolvent co-obligor makes an assignment of his property and assets for the benefit of his creditors, and among the assets assigned is a note on his co-obligor, can that co-obligor, who, after the assignment, has paid a debt, for which, as between themselves, they were equally bound as co-obligors before the assignment, plead his co-obligor's aliquot part of said debt as an off-set against his individual debt in the hands of the assignee?

To determine the question it is important to ascertain the relation in which co-obligors stand to each other.

We understand that co-obligors at law are liable to each other for contribution upon the principle of implied contract: that is, as soon as they enter into a joint undertaking, the law implies a promise of each to each that he will do what he is bound in natural justice and equity to do, that is, pay to the other any sum that he may pay on account of the joint undertaking over and above his proportion. The law, at the very moment the contract is entered into, implies this promise of each to each to indemnify and save the other harmless, and make him whole on account of any sum that he may pay for the other.

It is well settled that *indebitatus assumpsit* will lie by one co-obligor who has paid more than his share to recover contribution from his co-obligor. And this implied obligation is founded upon a natural duty which the co-obligors are presumed to recognize and consent to at the time they enter into the joint undertaking or assume the joint liability.

So in equity, without reference to contract, express or implied, the obligation to contribute rests upon natural principles of right, which spring up at the time the relation of co-obligors is entered into, and is consummated when one co-obligor pays more than his part of the debt.

A and B purchase property on their joint credit; each one receives his part of the property purchased. A agrees with B that when their joint debt falls due that he will pay B's part

of said debt, if B is not ready to pay it then, and B agrees that if A does so he will pay him back. When the debt falls due A, pursuant to his promise, pays B's part. The promise is supported by a sufficient consideration—the nature of the enterprise they entered into—and B is bound to A by this contract, not merely from the time A pays B's part of the debt, but from the time the agreement was made. If they are silent the law implies for them just such an agreement.

The fact will not be questioned that had Williams & Stevenson brought suit on the notes executed to them in place of the appellant, as receiver, that appellee's offset as against them would have been available, because he had paid said sum for them upon their joint liability, which they at law were under an implied promise to repay, not from the time of the actual payment by appellee, but from the time the joint undertaking was entered into. In equity the same obligation, resting in natural justice, sprung up at the moment the joint obligation was entered into.

If the appellant, as receiver, represented assignees of Williams & Stevenson for value the rule might be different; probably it would be different. Or if appellee had acquired his right to the debt pleaded by him as a set-off, after the assignment for the benefit of creditors, the rule would be different. But the appellant, as receiver, does not represent assignees for value. The assignees are merely the voluntary representatives of Williams & Stevenson for the benefit of their creditors. The equitable right acquired by these creditors by reason of the assignment consists in the right to an equal division of the assignor's assets among themselves. These assets are the assets found to be due after deducting all just setoffs, counterclaims, discounts, etc. This balance they are entitled to, and no more. This is all the fund Williams & Stevenson would have to satisfy their creditors in case they had made no assignment for the benefit of their creditors. Had Williams & Stevenson sued on these notes in place of the receiver, there is no doubt that the appellee could use as a set-off the amount he

had paid the bank for Williams & Stevenson on said joint obligation, which would have disabled Williams & Stevenson to that extent to meet the demands of their other creditors. Instead, the voluntary assignees of Williams & Stevenson, rather the receiver, bring suit on these notes; so to say that the creditors of Williams & Stevenson, by the voluntary assignment, can compel appellee to pay said notes in full, and then receive only a pro rata of the debt which he was compelled to pay for Williams & Stevenson, would be to put appellee in a worse position and the other creditors in a better position by the failure of Williams & Stevenson and the appointment of assignees.

It occurs to us, therefore, that as appellee's claim was founded on a transaction with Williams & Stevenson, which occurred prior to their assignment for the benefit of creditors, and at the moment that transaction was entered into there sprang up an implied promise on the part of each to each to pay to the other whatever sum he might have to pay over and above his part, that the sum paid by appellee was an available set-off, not only as against the notes given to Williams & Stevenson by appellee, had they brought suit on them in place of appellant, but as against the voluntary assignees of Williams & Stevenson, or their receiver, the appellant.

The affirmative allegations in appellant's reply are not such as, under the Civil Code, require a denial by rejoinder.

The judgment of the lower court is affirmed.

Judge Holt not sitting.

W. H. Holt and H. L. Stone for appellant.

J. J. Cornelison for appellee.

BALDWIN v. SHINE, PRESIDING JUDGE, &c.

(Filed December 2, 1886.)

1. Taxation—Injunction—A court of equity may enjoin not only the collection of an illegal tax, but also a proposed illegal assessment, final in its character, as where the county judge is proceeding to assess property under an information filed by the auditor's agent.

2. Failure of trustee to list property—The owner or possessor of property can not escape taxation upon it, either because the assessor fails to call upon him for his list or because he parts with the property before he is proceeded against, but after the time when, under the statute, the liability becomes fixed.

An administrator who has failed to list the trust estate may be required to do so after he has settled the trust and been discharged from it.

3. Nonresidents—Evidences of indebtedness—Evidences of indebtedness belonging to nonresidents have no actual situs here, and must be treated as located with the nonresident owner; but the "owner" is the person in whom the title, either absolute or qualified, is vested, and, therefore, as the personal estate of a decedent is annexed to the person of the administrator, evidences of indebtedness belonging to the estate have an actual situs in this State if the administrator resides here, his residence, and not that of the distributees, determining the situs.

4. The county judge in assessing property for taxation acts ministerially and not judicially.

5. Values under equalization law—The assessing officer in arriving at a person's "surplus" under what is known as the equalization law is not bound to accept the taxpayer's statement as conclusive of it.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

Robert B. Bowler, of Hamilton county, O., died intestate on July 4, 1864, being then the owner of a large estate in both that and this State. Administration was granted in the former State on July 15, 1864. There lived also his widow and children. The estate in Kentucky, aside from railroad stock, upon which taxes were paid by the railroad company direct into the State treasury, consisted altogether of notes and bonds. It was deemed expedient to have administration in this State also; and the appellant, Eli C. Baldwin, a friend of the family, was induced to remove from Ohio to Kentucky and undertake the trust. He qualified as the Kentucky administrator in the Kenton County Court on February 13, 1865.

Appraisers of the estate were then appointed, who appraised the evidences of debt exhibited to them by Baldwin at nearly \$600,000. He also signed the appraisement, thus making it his inventory. He continued to act as such representative until January 21, 1882. During this period of nearly seventeen years the estate in his hands of never less than \$400,000,

and amounting during some years to from \$1,000,000 to \$2,000,000, was never assessed by him, and so far as this record shows was never assessed elsewhere. Upon the day last named he made a final settlement of his accounts in the Kenton County Court, exhibiting the balance due the Ohio distributees; they, under the order of court, received their distributive portions; the court adjudged the estate as fully administered; and upon the confirmation of the settlement ordered that "E. C. Baldwin be discharged from any further consideration of said trust."

After all this had occurred, and on July 7, 1882, the auditor's agent filed in the Kenton County Court an information against Baldwin, as the administrator of Bowler, in which it was stated that from 1865 to 1882, inclusive, the latter had in his hands each year a certain amount (naming it and the year) of assets, which were subject to taxation under the revenue laws of this State.

He was thereupon cited by summons to appear and list it. He filed a response, setting up his settlement; the distribution and his discharge from the trust; also that there had never been in his hands at any time a surplus of assets over the indebtedness, or any property subject to taxation; that Bowler died domiciled in Ohio, where administration was first granted, and that the respondent had never been called upon by the assessor or any other officer to list any property in his hands belonging to the decedent. A reply was filed, and upon hearing the county judge, on September 2, 1882, dismissed the information.

Shortly thereafter the agent of the auditor filed a second information, identical with the first, *totidem verbis*, and the appellant, by his response, relied upon the same defenses as before, with the additional one, that the former dismissal upon the merits was a bar to the proceeding, and that the matter was *res judicata*.

A new county judge had now qualified; and upon the hearing he, on April 18, 1883, ordered "that Eli C. Baldwin, as administrator of Robert B. Bowler, be required to list for taxa-

tion the property held by him as administrator aforesaid for the years mentioned in the information, and that defendant pay the costs of this action."

In response the appellant tendered his affidavit, stating in substance that the property of the decedent in his hands during each of the years named in the information consisted entirely of notes, bonds and stocks; and that during the entire period the estate was indebted in a sum greater than the value of the entire personalty, excepting the railroad stock, upon which taxes were paid directly to the State treasurer; and that as, under the revenue law then in force, only the surplus left after deducting the indebtedness was taxable in such a case, he was not subject to assessment.

Objection was made to its being filed; witnesses were ordered to be summoned; and the court was proceeding to hear the matter when further action was stayed by the institution of this suit enjoining the county judge and the auditor's agent from proceeding further as to the proposed assessment. The action is based upon the grounds which were set up as defenses to the information; and the statements of the petition must be regarded by us as true, as the injunction was dissolved upon motion before answer, which was equivalent to a demurrer to the petition.

The question arises in limine whether the remedy by injunction will lie.

In many of the States equity will not enjoin even the collection of an illegal tax, and much less an assessment, because the assessor is regarded as a quasi judicial officer. It is said that public policy, which will not brook delay in the public business, requires this rule.

It seems to us, however, that the evils flowing from its enforcement overbalance this consideration. It is an object of equity to foresee and prevent wrong. One of its principal offices is to avoid multiplicity of suits and circuitry of action. By this rule the taxpayer is left to sue the collecting officer. This is unjust to both. It produces expensive litigation be-

tween two innocent parties, one of them being involved in it by reason of an honest effort in official duty.

The courts of Illinois, Indiana, Pennsylvania and some other States, including this one, have discarded this rule, and hold that a court of equity may enjoin the collection of an illegal tax. (Louisville & Nashville R. R. Co. v. Warren Co. Ct., 5 Bush, 243; Gates v. Barrett, 79 Ky., 295.)

This being so, why is it not equally proper, in view of the aims of equity, to extend the rule to a proposed illegal assessment, final in its character, as this one would be? It is illogical to say that the chancellor can control the consequences, but not the act productive of them; or that he can not arrest the act, but may lay his hand upon those who attempt to carry it to its necessary results. An illegal assessment produces injury by creating a *prima facie* claim. Each leads to the same result; and surely one is not required to wait for the infliction of an injury before asking equitable relief. Of course this rule does not apply to an ordinary assessment, not final in its character, where the party may apply to the board of supervisors or the county judge for relief:

The next inquiry is whether the appellant, upon the face of his petition, is entitled to it.

He bases his claim to it upon three grounds:

1st. His settlement of the trust and his discharge from it before the institution of any proceedings against him.

2d. The assets being mere indebtedness, had no actual situs; and must be treated as constructively located with the owners and at their domicil; and the Bowler heirs being nonresidents, the estate was not subject to taxation in Kentucky.

3d. The judgment upon the first information is a bar to all further proceedings.

The general rule is that all property is taxable. If exempt, it is an exception.

Section 11, article 5, chapter 92 of the General Statutes, provides:

“All taxable estate shall be valued as of the 10th day of January in the year listed; and the person owning or possess-

ing the same on that day shall list it with the assessor, and remain bound for the tax notwithstanding he may have sold or parted with the same."

The assessment is made as of a certain day in each year. The liability is fixed as of that day, and the owner or possessor of the property upon that day is bound for the tax, although he may subsequently part with it. While the law contemplates that the owner will be called upon by the assessing officer for his list, and makes it the duty of the latter to do so, yet it equally contemplates that all property liable to taxation shall be assessed.

Section 26, article 5, chapter 92 of the General Statutes, provides:

"Any person who has failed to give in his list of taxable property because he was not called upon by the assessor may, after the assessor has returned his tax book, list the same with the county court clerk at any time before the 1st day of October, who, on taking the same, shall be governed by the law regulating the duty of the assessor."

It is manifest from these statutory provisions that it was not intended that property should escape taxation by the government which protects it, either because the assessor fails to call upon the owner or possessor for his list or because the latter parts with it before he is proceeded against, but after the time when the liability becomes fixed.

It is true that debts have no place independent of the domicile of the owner. While specific articles of personal property permanently located in this State, and belonging to nonresidents, may be listed even to the possessor, yet evidences of indebtedness have no actual situs here, and must be treated as located with the nonresident owner; but that case is not this one. The word "owner" in the statute refers to the person in whom the title is vested, either absolute or qualified. Here the estate was taken in charge by the Kentucky administrator; the legal title was in him; the estate followed him, and was annexed to his person, thereby having an actual situs in this State, by the law of which it was protected. Moreover, it was

under the charge of, and had to be distributed through, a court of this State. These facts clearly show that the second ground of complaint is untenable.

It is earnestly urged, however, that the action of a county judge in assessing for taxation is judicial, and not ministerial, and that the dismissal of the first information was a bar to any further proceeding.

If this be true, then this suit can not be maintained. The county court has the power to make an assessment. If it acts judicially in so doing, then it may be said that it had jurisdiction to hear the second information; and we, therefore, have a case where one court is asked to enjoin the action of another as to a matter over which it has jurisdiction. Relief from improper judicial action should be sought through the channel of an appeal or certiorari, or writ of prohibition. The remedy now sought seems to concede that the county judge was acting as a ministerial officer. If so, then his action upon the first information is not a bar to the second one. The inquiry arises, is an assessment by him an act of a judicial nature?

The assessor must necessarily use some judgment in making assessments, as is the case, to a greater or less degree, in all ministerial action. It is well settled in this State, however, that the act of an assessor is a mere ministerial one; and yet what more does the county court do in making an assessment than the assessor?

By our State Constitution the powers of government are legislative, executive and judicial, making three distinct departments, and neither can exercise any power belonging to the other save in the instances permitted by that instrument. It classes the county court as a part of the judiciary; that this power has repeatedly and for a long time recognized the right of the county court to perform ministerial duties. This view has also received legislative sanction; and may now, by reason of uniform practical construction, dating from the formation of our State government, be regarded as beyond question. Numerous statutes may be found conferring the power to perform

such nonjudicial duties, which were enacted prior to the adoption of our present Constitution. Its framers undoubtedly knew this fact, but yet made no change, thereby virtually recognizing their validity.

The power to impose taxes can not be conferred upon a tribunal which has judicial powers alone; neither is their apportionment or assessment a judicial power. This is well settled in this State. Why then should the action of a county court, which may perform both judicial and ministerial duties, be regarded as judicial, when, for the purpose of compelling all property to bear its proportionate part of the public burden and to catch delinquents, it is required merely to perform what the assessor should have done? Its powers being of a mixed character, it is sometimes difficult to tell upon which side of the often shadowy line its acts should be ranged. Its action may, under one state of fact and law, be judicial, while under another it may be ministerial; but where, as in this instance, its office is merely to supply the omission of a ministerial officer, we fail to see any good reason why its action should be regarded as judicial.

These views are supported by the case of *Pennington v. Woolfolk, &c.*, 79 Ky., 13, and we conclude that the proceedings upon the first information were not a bar to the second one.

We do not construe the order of the county court made on April 18, 1883, as determining the liability to taxation of the assets which had come to the appellant's hands as administrator, or that he should list them without any deduction for indebtedness, if such existed, but only that he was required to make a list. The county judge appears to have so regarded it because he was proceeding to hear the matter when further proceedings were enjoined. The record does not show that he rejected the affidavit of the appellant; but only that it was tendered and objected to by the representative of the State. Necessarily the assessing officer, in acting under what is known as the equalization law, and in arriving at a person's "surplus"

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over his indebtedness, must often accept the taxpayer's statement as conclusive of it. Often he can not otherwise arrive at it, but he is not bound to do so. It would be unreasonable to so suppose in a case where he had reasonable ground to believe that the party was making a false assessment. The law intended that he should avail himself of all the means within his power to get at the facts of the case; and this the county court was endeavoring to do when it was prevented from proceeding by this action.

Inasmuch as the petition in this case avers that, aside from the railroad stock, the estate of Bowler, during the entire period covered by the information, was indebted in an amount larger than its assets, we should, if we understood the order of the county court as peremptorily ordering the appellant to list the assets that came to his hands without regard to any indebtedness, reverse the judgment below, with direction to the chancellor to order the county court to hear the question, both as to assets and indebtedness; but we think the proceedings show that it was merely proceeding to do so when enjoined, and the judgment is, therefore, affirmed.

Wm. Lindsay, John W. Stevenson and O'Hara & Bryan for appellant.

T. F. Hallam and H. P. Whitaker for appellees.

FOGG'S ADM'R v. RODGERS, &c.

(Filed December 9, 1886.)

In every sale of goods, where the vendor sells an article by a particular description, it is a condition precedent to his right to recover the purchase price that the thing which he offers to deliver should answer the description; and even if the thing has been delivered the purchaser may upon discovering, within a reasonable time, the fact that it does not answer the description, return it and avoid recovery of the price.

In this case appellee purchased at public sale a number of stacks of what was represented to be hemp. When he spread it he discovered that the stacks were composed of so large a portion of weeds that they could not be

characterized as stacks of hemp, whereupon he notified the vendor of the fact, and tendered to him the stacks.

Held—That the vendor failed to perform his contract, and can not recover the purchase price.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellant, administrator of E. Fogg, deceased, against appellee on a note for \$582.95, of which \$1.25 was for a horse cart, and \$581.70 was for twenty-three stacks of what was sold as hemp, which appellee bid for and purchased at a public sale of the personal estate of the decedent.

Verdict and judgment were rendered in favor of the plaintiff for only \$1.25, the price bid for the horse cart.

In defense of the residue of the note the defendant stated:

1st. That when the sale was made the crop was in stacks on the farm of the decedent, and was represented and warranted by the plaintiff as hemp, but was not inspected by the defendant; that shortly after the sale he proceeded to spread it, and then discovered the first time, what he avers to be true, that the crop purchased by him was not hemp, but weeds, and utterly worthless, whereupon he notified the plaintiff he would not receive, and tendered it to him.

He further says he could not, with ordinary care and diligence, have ascertained, before purchasing, the condition of said crop, and of what said stacks were composed, and that there is no consideration for the note.

In the second paragraph of his answer he prays damages for the expenses incurred by him, and for the failure of the plaintiff to comply with his contract, amounting to \$550, which he says he has been injured.

In an amended answer he states that the plaintiff announced, and caused it to be announced by the auctioneer making the sale, that he and the family of the decedent would make public all the information they possessed in regard to the quality and condition of all the crops and property to be then sold, and relying upon that representation he (defendant) purchased

said crop without examining it. But that it was, at the time of the sale, known to the plaintiff, or to divers members of the family of the decedent then present at the sale, to be largely composed of weeds and worthless, but they failed to give information of the fact, which he says was a fraud on him, and by reason of which he was damaged, etc.

All the averments made by the defendant as defenses to the action were controverted by the plaintiff, and issues made in regard thereto.

The evidence is somewhat conflicting as to the number of stacks that were mixed with weeds, but several witnesses testify positively that the proportion of weeds to hemp in the stacks examined by them was so great as to render them worthless.

There is also some conflict in the evidence in regard to the alleged announcement of the plaintiff that he and the family of the decedent would make public all the information they possessed in regard to the quality and condition of all the crops and property sold.

But upon both these questions of fact there was sufficient evidence to authorize the verdict of the jury, or at least enough to make it improper for the court to disturb the verdict on the ground it is palpably against the evidence.

The only question then it is necessary for us to consider is as to the ruling of the court in the instructions given and refused.

The jury was instructed in regard to the defense set up in the first paragraph of the answer substantially that if the plaintiff, by himself or the auctioneer, represented at the time of the sale that the contents of the twenty-three stacks was hemp, and that the contents was so largely composed of weeds that their distinctive quality as hemp was lost, and such fact was unknown to defendant, and could not be ascertained by an inspection of the stacks by a person of ordinary intelligence and prudence at the time of the purchase, they ought not to find for plaintiff any portion of the purchase price. And if the

contents of a portion of them contained so large a proportion of weeds as to have lost its distinctive quality as hemp. then they should allow the defendants a credit or abatement upon the note sued on to that extent.

In every sale of goods, where the vendor sells an article by a particular description, as was done in this case, it is a condition precedent to his right to recover the purchase price; that the thing which he offers to deliver should answer the description; and even if delivered the purchaser may, upon discovering the failure of condition in a reasonable time, return it, and avoid recovery of the price. (Benjamin on Sales, section 600, and authorities cited.)

In Hilliard on Sales, 265, it is said that "there is an implied warranty that the thing sold is in specie that as which it is purchased."

Both Benjamin and Hilliard, however, in their respective works refer with approval to the following from Lord Abinger, in *Chanter v. Hopkins*, 4 Mees. & W., 399: "A good deal of confusion has arisen in many cases upon this subject from the unfortunate use made of the word warranty. Two things have been confounded together. A warranty is an express or implied statement of something which a party undertakes shall be a part of a contract, and, though part of the contract, collateral to the express object of it. But in many of the cases the circumstances of a party selling a particular thing by its proper description has been called a warranty, and the breach of such a contract a breach of warranty; but it would be better to distinguish such cases as a noncompliance with a contract which a party has engaged to fulfill; as if a man offers to buy peas of another and he sends him beans, he does not perform his contract; but that is not a warranty. There is no warranty that he should sell him peas; the contract is to sell peas, and if he sells him anything else in their stead it is a nonperformance of it."

In this case the plaintiff sold to the defendant twenty-three stacks as being hemp, and whether it be called a warranty that

what he sold was hemp or a condition of the contract, he certainly should not recover the purchase price if the stacks afterwards turned out to be weeds instead of hemp, or if they were composed of such proportion of weeds as that their distinctive quality or character as hemp stacks was lost.

It is not necessary to quote from the authorities cited in the text-books in support of so plain a proposition, nor to multiply illustrations of the distinction between defects that may exist in an article, affecting its value, and its description or identity.

If, using the illustration given, the contract is to sell peas, it is not performed by delivering beans, or such proportion of beans in the package as that its distinctive quality as a package of peas is lost. So the contract here being to deliver twenty-three stacks of hemp, it was not performed by delivering stacks containing such proportion of weeds as that they could not be characterized distinctively as hemp stacks.

The instruction was really more favorable to the plaintiff than he was entitled to. For if even a material portion of the stacks contained such undue proportion of weeds, there was a nonperformance of the contract.

It is complained that the instruction given to meet the issue presented by the amended answer and reply thereto was erroneous in hypothecating the right of the defendant to avoid the contract, upon the assumption that the distributees or devisees, instead of the family of the decedent, were aware of the quality of the stacks, and failed to give to the bidders information in regard thereto.

It is not necessary to consider the objection to this instruction inasmuch as the question submitted to the jury by the instruction we have quoted is decisive of the whole case. For if it be true that the stacks were of the sort alleged in the defendant's answer, he could avoid the payment of the consideration, whether there was fraudulent concealment on the part of those interested in the estate of the decedent or not. For the stacks were sold as hemp stacks, and he was not bound to receive or pay for stacks answering any other description.

It is true he avers he was induced to forego an examination by reason of the alleged announcement by the plaintiff that the family would give such information in regard to defects in any of the property sold as they might have, by opening the stacks with a view to spread the hemp.

But the main defense in this case is not that defects existed, but that an article was sold which was different in description from that delivered or offered to be delivered, and there is nothing in the record to show that the appearance of the stacks indicated the presence of such a proportion of weeds as afterwards developed.

We do not think the court erred or that the plaintiff was prejudiced by the filing of the amended answer, nor was it error to permit the defendant to testify in regard to a transaction between him and the living administrator, nor was it improper to permit bundles taken from the stacks to be exhibited to the jury.

Judgment affirmed.

Porter & Wallace for appellant.

D. L. Thornton for appellees.

GIST v. SHEAN.

(Filed October 25, 1876—Not to be reported.)

It is an available plea in abatement that another action is pending between the same parties in which the same relief is sought, and the defendant may upon the trial insist upon his plea, although the other action may before then have been dismissed.

Appeal from Hardin Circuit Court.

Opinion of the court by Chief Justice Lindsay.

It is conceded that at the time the original answer was filed herein another action was pending in the Hardin County Court between the same parties, in which the same relief was being sought. The answer, therefore, presented, and the proof sustained, an available plea in abatement. The fact that the

action in the county court had been dismissed before the trial of the issue raised by the original answer did not take away from the appellant the right to insist upon her plea. (Frogg's Ex'ors v. Long's Adm'r, 3 Dana, 157.)

Section 120, Civil Code of Practice (section 92 Bullitt's Code), recognizes the correctness of, and continues in force, the rule announced in the case cited.

The two judgments are reversed and the cause remanded, with instructions to dismiss appellee's petition without prejudice.

J. P. Hobson for appellant.

KENTUCKY SUPERIOR COURT.

WILSON v. JONAS.

(Filed October 8, 1886.)

1. No appeal lies from an order appointing a receiver, if the order is void, until a motion to set it aside has been made and overruled in the inferior court.

2. Receivers—Notice—To authorize the appointment of a receiver without notice to the defendant it must appear that the short delay required to give notice will result in irreparable injury to the applicant.

3. Erroneous and void orders—An order appointing a receiver may be erroneous, but is never void for want of notice to the defendant.

In this case the court, upon ex parte affidavits that the defendant had refused to obey an order of injunction restraining him from interfering with the plaintiff's possession of certain property, appointed a receiver upon application made without notice to the defendant, and ordered the receiver to take possession of the property and rent it out for the ensuing year. Held—That as the property itself was not in danger of being destroyed, and the plaintiffs only prevented from conducting their business, there was no necessity for making the appointment without notice to the defendant, and the order of appointment was erroneous.

Appeal from Daviess Circuit Court.

Opinion of the court by Presiding Judge Bowden.

On their petition, filed November 25, 1885, the appellees obtained an injunction against the appellant. The summons and

the order were served November 27. Upon affidavits showing a flagrant and intentional disregard of the order by the appellant the judge of the circuit court made an order at chambers appointing a receiver, to whom possession of the property was delivered under a writ ordered and issued for that purpose.

The appellant claims that the order appointing a receiver is void because no notice was given that it would be applied for. The record before us does not show that the appellant had at any time appeared in court for any purpose. Section 298 of the Code declares that an order appointing a receiver, though made by the judge in vacation, shall be deemed final for the purpose of an appeal. Section 763 provides there shall be no appeal from a void judgment until a motion to set it aside has been made and overruled in the inferior court. The "final order" referred to in section 298 must be regarded as included in the "judgment" referred to in section 763. Therefore, if the order is void the appeal must be dismissed.

But on full consideration we are of the opinion that it is not void. The act of appointing a receiver without notice may be valid, or it may be erroneous. In *Verplanck v. Mercantile Ins. Co.*, 2 Paige, 450, Chancellor Walworth said that "a receiver can not be appointed ex parte before the defendant has had an opportunity to be heard in relation to his rights, except in those cases where he is out of the jurisdiction of the court, or can not be found; or where, from some other reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the opposite party, to prevent the destruction or loss of property. Formerly it was never done till after answer." In *French v. Gifford*, 30 Iowa, 148, where a receiver had been appointed by a judge in vacation under a statute authorizing it, but without notice, the court laid down the rule quoted, holding that to justify the appointment of a receiver without notice the facts rendering it necessary should be set out in the application; and the order was held to be erroneous in that case. To the same effect are *Treibert v. Burgess*, 11 Md., 459; *Bostwick v. Isbill*, 41 Conn.,

305; Weems v. Lathrop, 42 Texas, 211; Tibbals v. Sargeant, 1 McCarter, 449, and other cases which we have consulted.

If without notice a valid order of appointment may be made in cases of extreme urgency, the question must be whether that pressing necessity existed so as to justify the exercise of the power, or whether the court erred in the particular case in making the appointment under circumstances which did not require summary action. The power and jurisdiction being conceded, the order, however, unwarranted, is not void.

It is suggested that notice is not necessary in any case, because the Code sections in regard to appointing receivers do not require it. When it is considered that receivers often exercise powers of the most extended character, even to the taking and selling of a litigant's entire estate, it can not be supposed it was intended by the legislature that such powers should be conferred on any one otherwise than according to the common course by which justice is administered. A conservative, yet efficient, rule has been adopted by the courts; and it was not thought proper to change it, either by providing that there shall be previous notice in every case, which might permit disaster at the hands of fraud or violence; or by providing that there need be no notice in any case, whereby the fortunes of litigants might be jeopardized by the ex parte proceedings of reckless men. The rule is substantially that recognized by section 276 of the Code in regard to granting injunctions. If the court or officer must be satisfied that the short delay required to give notice will result in irreparable injury to the applicant before it can, without notice, grant an injunction to prevent a defendant from dealing with certain property in a certain way, it would be singular if the same court, satisfied that no special harm could result from the short delay required for notice, should be empowered to take the property out of the defendant's hands and dispose of it as the court might order. An injunction preserves a status. A receiver changes it. It seems to us there is quite as much reason for notice in the latter case as in the former.

In *Price, &c. v. Price*, 5 Ky. Law Rep., 330, it was held "clearly erroneous to make such appointment without notice of some kind to the parties affected by it. They were not before the court in any way, and the order was void." This is merely an instance of the unfortunate use, or rather misuse, of the word void. The order was held to be erroneous, and that is all that need to have been said. That case does not sustain the proposition that an order of appointment is void unless there has been notice. The facts of that case showed no emergency.

The facts, as alleged in the petition in this case, show that Wilson was wrongfully in the possession of the property of the appellees, and it was alleged that a continuance of that possession would work an irreparable injury. The property itself was not in danger of being destroyed, but the appellees, being prepared to buy and handle tobacco, were prevented from conducting their business. The profits of that business were necessarily conjectural; it could not be certainly averred that there would be any; the allegation, if made, was incapable of proof. Contracts had been made with hands to manage and conduct the business; but even with regard to that matter it is not alleged that they were then under pay, or that the requisite delay in order to give notice would or could fasten any expense on the appellants.

The summons, with the order of injunction endorsed, was served November 27; the former warning him to answer in ten days, the latter requiring immediate obedience. The next day, in a different county, application was made to the circuit judge to appoint a receiver. There was no notice whatever of the intended application. It was granted on ex parte affidavits that Wilson had refused to obey the order of injunction, and was still in possession, armed and threatening violence against the agents and servants of the appellees if they should attempt to go on the premises. Certainly a very bad case was alleged against him, and it is quite clear that if he had had an opportunity to be heard, and the case stated had been shown, there could be no objection to the order appointing a receiver. The

object of the temporary injunction was to assure to the appellees the quiet possession of the property. It decided for the time being that the appellees were entitled to the possession; and it may be that, on their application, a receiver could have been appointed without notice to Wilson, to take and hold such possession as was awarded to the appellees, as a mere means of enforcing the order of injunction. But that was not done. Wilson could have proceeded to have the injunction dissolved at any time, and that would have left the matter open; but the judge ordered the receiver to take possession of the property and to rent it out until October 1, 1886, thus determining that for the coming year the appellant should be deprived of the actual possession, though in the meantime the injunction may have been dissolved.

The counsel for the appellees urges that the order should be sustained on the ground that Wilson was in contempt, and had no standing in court. But was he in contempt? On that question he was not heard. Was he a trespasser? He was not permitted to refute that charge.

In view of the adjudged cases, and of what seems to us the reason and justice of the rule, our conclusion is that it was erroneous to make the order appointing a receiver on the state of case disclosed by the petition and affidavits without giving Wilson reasonable notice of the intention to apply for it.

The order is reversed and the case is remanded, with directions to set it aside and for further proceedings.

J. D. Powers, Sweeney & Son and Geo. W. Jolly for appellant.

Owen & Ellis for appellee.

COURT OF APPEALS ABSTRACTS.

CLARK'S ADM'R v. NEWMAN, &c.

Filed November 30, 1886. Appeal from Metcalfe Circuit Court. Opinion of the court by Judge Holt, affirming.

1. Executors and administrators—Commission—The widow of a sheriff having, as administratrix, collected several thousand dollars of unpaid taxes, the allowance to her of commission thereon, in an action by her to settle the estate as insolvent, was a matter within the sound discretion of the court, and the court having allowed her therefor the same sum that sheriffs by law receive, there was no such abuse of discretion as warrants interference by this court, although the deputy sheriffs probably receive all that was allowed as commission.

2. Interest—While the provision of the statute that "a personal representative, after the expiration of two years from the time he qualifies, shall be charged with interest on the surplus assets in his hands from that period," may not apply in all cases, it certainly applies where there is a presumption that the personal representative has used the assets. In this case, twenty years having elapsed since the intestate's death, the presumption is that the administratrix has used the assets, she being silent on the subject.

W. Lindsay for appellant.

Garnett & Dehoney for appellees.

CRANE v. COMMONWEALTH.

Filed November 30, 1886. Appeal from Hickman Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Practice—Argument to jury—Although not a correct practice to allow the reading by counsel for the State of extracts from the text-books on criminal law by way of argument to the jury, the accused in this case was not prejudiced thereby, the effort of counsel being to support the instructions of the court, and not to establish that they were erroneous.

2. Recalling witness—The action of the court in allowing the prosecuting witness to be recalled after he had testified, and to exhibit to the jury a wound which he had already stated had been inflicted by the accused, was not prejudicial to the defendant.

E. F. Bullock for appellant.

P. W. Hardin for appellee.

CITY OF COVINGTON v. GASLIGHT CO.

Filed December 2, 1886. Appeal from Kenton Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Suit for taxes—Under the provision of a city charter authorizing the city council to cause the annual taxes against any person or corporation to be sued for where they amount to \$100 or over, and have been due more than six months, it is not necessary that the council, in authorizing suit to be

brought, should designate the particular person or persons to be sued; a general direction to sue delinquent taxpayers is sufficient.

2. Defect in petition cured—In a suit by a city to enforce the collection of taxes, facts should be alleged showing that a levy was made in the manner provided by the charter, and demand of the taxpayer before suit should also be alleged; but where these facts are put in issue by the defendant the defect in the petition in failing to allege them is cured.

3. Municipal taxation—Designation of property—When the charter of a city authorizes the taxation of real estate, personal estate, bonds, choses in action, etc., "together with any property of any kind subject to taxation under the laws of this Commonwealth," the assessor has full power to assess for taxation all the property owned by the inhabitants of the city or located within its limits.

4. Exemption of "machinery"—The exemption from taxation of "machinery in manufactories" does not exempt the pipes, lamp posts and meters of a gas company.

5. Estoppel—The mere fact that a city has failed to tax property for a number of years does not estop it from imposing the tax.

6. The failure of appellant to publish that the tax bills were in the hands of the collector does not prevent it from suing the taxpayer after demand made, the taxes having been due for six months.

McKee & Finnell for appellant.

J. F. & C. H. Fisk for appellee.

FIRST NATIONAL BANK OF MADISON v. SCHUSSLER, &c.

Filed December 4, 1886. Appeal from Campbell Chancery Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Assignment of mortgage—Sureties—P. endorsed for S. and G. in bank. The wives of S. and G., to secure the bank and P., pledged to the bank stock owned by them as separate estate, and S. and G. executed to P. as trustee for their wives two notes, and a mortgage on real estate to secure their payment. The notes and mortgage were assigned by P. as trustee, and with the money thus raised the note in bank was paid off, and the stock pledged to secure it restored to the wives of the debtors. Held—That while the payment of a debt is a release of the surety, and the release of the surety is the release of the indemnity given him, the mortgagee in this case had the right to assign the notes and mortgage to raise the money to pay off the debt in bank and relieve the stock pledged to secure it, and the mortgage can be enforced in the hands of the assignee.

2. Contract for benefit of third person—G. conveyed property to P., the conveyance providing that the grantee should pay a debt which the grantor owed to M. P. conveyed the same property to S., the conveyance providing that S. should save P. harmless as to the debt of G. he had undertaken to pay. Held—That while M. might have sued P. and recovered the debt he undertook to pay for G., yet the undertaking by S. to save P. harmless gave M. no right to sue S., P. having paid nothing.

Benton & Benton for appellant.

O'Hara & Bryan for appellees.

SHUCK'S EX'OR v. McELROY.

Filed December 11, 1886. Appeal from Marion Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Devise—Trust—Release of life estate—A testator devised a certain portion of his estate to his executor in trust, the annual profits to be paid to the testator's daughter during her life, and at her death the principal to be paid to her children. The life tenant came into court and relinquished her life estate for the benefit of her children.

Held—That this put an end to the executor's trust, and that a judgment ordering the executor to pass the estate to the remaindermen at once was proper, the executor being protected by a reservation in the judgment as to any claim he may have against the life tenant.

Roundtree & Lisle for appellant.

Harrison & Belden for appellee.

KENTUCKY CENTRAL R. R. CO. v PENDLETON COUNTY, KY. &c.

Filed December 11, 1886. Appeal from Pendleton Chancery Court. Opinion of the court by Judge Holt, reversing.

1. Railroads—County taxation—A provision in the charter of a railroad company that it shall pay into the State treasury a certain sum as taxes "and no more," does not relieve it from the payment of county taxes.

2. The mode of assessing a tax is entirely within legislative control, it only being necessary that there should be a levy or assessment in some form.

3. Assessment of railroads—As to railroads in Kentucky, the valuation by the railroad commissioners, and the fixing of a rate of taxation by the county levy court upon the real estate generally of a county, together constitute the assessment for taxation, and a re-assessment or levy of the railroad taxes by the county authorities is not only unnecessary, but is forbidden by the statute.

4. Pleading—A petition against a railroad company for the recovery of county taxes must set forth the valuation by the railroad commissioners, and aver that the valuation was made for the year for which the taxes are sought to be recovered, and the omission of such an averment is not cured by filing a certified copy of the valuation as a part of the petition.

5. Notice of valuation—Notice by the auditor to both the county clerk and the railroad company of the amount of the valuation by the railroad commissioners is a prerequisite to the recovery of taxes of the company, and such notice must be averred.

6. Interest on taxes—A tax, although payable at a certain time, does not carry interest unless the statute says so, and interest is not allowable by way of damages. Therefore, taxes against railroads do not, under our statutes, bear interest.

7. Demand—While it is a general rule that before distraint can be had or suit brought for taxes a demand of payment must be made, yet where the statute provides that the tax must be paid by a certain time, and that for a failure to pay suit may be brought and a penalty imposed, no demand is necessary.

Stevenson & Goebel and O'Hara & Bryan for appellant.

J. T. Simon for appellees.

MILLER'S EX'OR, &c. v. SIMPSON, &c.

Filed December 11, 1886. Appeal from Adair Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Devise of personalty—Limitations—The same limitations and conditions may be placed upon a devise of personal estate as upon a devise of real estate.

A testator devised a certain part of his estate to his daughter, and provided that if she should die without heirs of her body her share should revert to his estate. A part of the estate thus devised was personalty. Held—That the condition was valid, and that the devisee dying without issue, her share of the personalty as well as of the realty reverted to the testator's estate.

2. Wills—Renunciation by widow—From the time the widow renounces the provisions of her husband's will she becomes entitled to one-third of the surplus of the estate, without making any deduction for fees and expenses incident to litigation about the will, in which she has no interest.

3. Interest—A widow who had renounced the provisions of her husband's will qualified as curatrix pending a contest over the will. The will being established by order of the county court, an executor was appointed, to whom the widow was ordered to turn over the estate. The widow made a settlement as curatrix, showing a balance in her hands, which she failed to pay over. The contest over the will continuing by reason of an appeal to the circuit court, no distribution was made. Held—That the widow is chargeable with interest from the time of her settlement on only so much of the balance remaining in her hands as is in excess of her distributive share, it being no fault of hers that there was not then a distribution.

4. Personal representatives—Expenses of litigation—It was the duty of the widow as curatrix to defend an action in which an injunction was obtained to prevent a settlement and distribution of the estate in her hands, and she is entitled to a credit by all reasonable attorneys' fees and expenses incurred by her in that litigation; but fees and expenses paid by her on account of the litigation over the will, for the benefit of the contestants, should not be charged to the estate. It was proper, however, for the court, having all the parties before it, to ascertain what she paid on that account, and require it to be paid to her out of the respective interests of the contestants.

5. Decedent's estate—Proof of demands—The court should never allow a demand against the estate of a decedent unless the account is definite and the services proved to have been actually rendered and reasonably worth the sum charged. It was error in this case to allow an attorney a sum claimed for services in "looking after the estate," particularly as it appeared he had previously been allowed by the county court the same amount on an itemized account.

H. C. Baker, Hindman & Sampson and T. T. Alexander for appellants.

James Garnett, Montgomery & Jones, Wm. Lindsay and T. C. Winfrey for appellees.

ROSENHAM v. COMMONWEALTH.

Filed December 14, 1886. Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor, affirming.

1. Title of act—The act of 1884, entitled "An act to amend chapter 92, General Statutes; title. Revenue and Taxation," is not unconstitutional because it provides a penalty for selling spirituous liquors without a license. Such a provision is not foreign to the subject expressed in the title, but has a direct connection with it.

2. Druggists who sell spirituous liquors without a license are subject to the penalty imposed by that statute, unless the liquor is sold to be used for medical purposes. The court is "satisfied" that a druggist is as much a "merchant" as one is who sells goods or wares; yet if he is not, the law has omitted to provide the manner in which he is to get his license, and, therefore, he has no right to sell.

The appellant, a druggist, having admitted that he sold for other than medical purposes, is subject to the penalty imposed by the statute.

O'Neal, Jackson & Phelps for appellant.

Helm & Bruce for appellee.

NICHOLS v. C., O. & S. W. R. R. CO.

Filed December 14, 1886 Appeal from Hardin Circuit Court. Opinion of the court by Judge Holt, reversing.

1. Railroads—Speed of trains—While any rate of speed of a railroad train in passing a mere flag station is not per se negligence as to trespassers on the track, the rule is different as to persons on the track at a point where the public have a right to be.

2. Duty to passengers—A carrier is bound to use due care, not only in transporting its passengers, but as to their accommodation while waiting for, and during their reception into, the vehicle.

3. Care required—The care to be exercised by a railroad company must depend upon the existing circumstances known to it, or which it ought to know.

A railroad company had its ticket office in a small village located on one side of the railroad and its platform upon the other. One who was crossing the track at this point for the purpose of assisting his wife to take a train about due was struck by a passing engine and killed. The speed of the engine was at least twenty five miles an hour, and the testimony tended to show that no signal of its approach was given until it was immediately at the depot, and just before it struck the deceased.

Held—That there was sufficient evidence of willful neglect to require a submission of that question to the jury, and that the court erred in instructing the jury to find for the defendant.

Hargis & Eastin and James Montgomery for appellant.

J. P. Hobson for appellee.

January, 1887—6

SUPERIOR COURT ABSTRACTS.

HOWE v. DUPOYSTER, &c.

Filed November 17, 1886. Appeal from Ballard Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Partnership—A contract whereby one becomes entitled to share in the profits of a business, in consideration of money or other property furnished, constitutes him, as to creditors, a partner in the business. Therefore, an agreement that one shall have a certain share in the profits of a business in consideration of his furnishing a house for carrying on the business, makes him liable to creditors as a partner.

Bugg & Wilds for appellant.

White & Warden for appellees.

GIBSON v. KENTUCKY GRANGERS' MUTUAL BENEFIT SOCIETY

Filed November 17, 1886. Appeal from Scott Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Recovery of money paid under mistake—Where money has been paid without cause or consideration to one who was not entitled in law, honor or conscience to receive it, the person paying it may recover it back, provided it was paid under a palpable misconception of the law essentially bearing upon and affecting the contract.

A benefit society issued a certificate of membership contracting to pay the amount to be due upon the death of the member to one who was not a member of his family, believing that it had the right under its charter to make such a contract, and upon the death of the member paid to the beneficiary named in the certificate the amount due thereon, believing that he was entitled thereto under the contract. Under its charter the society had no power to make such a contract, the fund being for the benefit of the widow and children of the deceased member, from whom it could not be diverted by any contract made by the society.

Held—That the society may, in an action against it, by the widow and children of the deceased member to recover this fund, recover upon cross-petition of the person to whom it has paid the fund under mistake of law, he being entitled to retain the premiums, or death calls, paid by him, and also the amount expended by him in making out proof of loss, and being chargeable with interest only from the date of the judgment.

2. Pleading—To entitle one to recover money paid under a mistake of law it is not necessary that he should allege in express terms that there was such a mistake; it is sufficient to allege the facts, from which the conclusion inevitably follows.

3. A cross petition may be maintained against one not a party to the original petition, and upon a cause of action which affects, or is affected by, the original cause of action.

4. Benefit societies—Rights of beneficiaries—Where the charter of a benefit society provides that the fund payable upon the death of a member shall be for the benefit of his widow and children, they are entitled thereto, although another was named in the certificate of membership as the beneficiary, and paid the death calls, he being entitled to have restored to him all that he has expended for the benefit of the beneficiaries named in the charter. Nor do the charter beneficiaries, as between themselves and the beneficiary named in the certificate, waive their right to the fund by consenting that it may be paid to him, there being no consideration for the waiver, and nothing to operate as an estoppel.

Wm. Lindsay and Turner & Son for appellant.

A. Duvall and J. F. Askew for appellee.

ROYAL INSURANCE CO. v. SMITH & BEALL.

Filed November 19, 1886. Appeal from Clark Court of Common Pleas.

Opinion of the court by Presiding Judge Bowden, reversing.

1. Pleading—Conditions precedent—A plaintiff must allege facts showing the performance of all conditions precedent to his right to sue, and the omission of such averments is fatal either on demurrer or in case of judgment by default.

In an action on a policy of insurance, providing that the amount of the loss should not be recovered unless the proof of loss was made within a certain time and in a certain way, an allegation in the petition that the plaintiff had "fulfilled all the conditions of the policy" was not a sufficient allegation of performance of the conditions precedent, and a demurrer to it should have been sustained.

2. Defects in petition cured—A petition will be good after verdict if it contain allegations from which every fact necessary to maintain the action may be inferred. From the allegations in this case, that the plaintiff had performed all the conditions of the policy, it was fairly inferable that he made the required proof, and a verdict for the plaintiff would have cured the failure to state the facts.

3. Where there is an allegation of value or of damages, which must be sustained by evidence, though the defendant makes default, it may be the verdict should be regarded as curing such allegations if defective, but not as curing other defective allegations, which may be taken as confessed.

4. Insurance—Allegation of value—In an action upon a policy of fire insurance the allegation that the plaintiffs had an "interest" in the property insured to an amount exceeding a named sum, and that they were the exclusive owners, was not a sufficient allegation of the cash value of the property.

Hargis & Eastin for appellant.

Wm. Lindsay for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. COMMONWEALTH.

Filed November 19, 1886. Appeal from Whitley Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Indictment—An averment in an indictment that the defendant "did unlawfully obstruct the public road" leading from one town to another,

naming the towns, is not an averment that there was a public road leading from one place to another, which public road was obstructed by the defendant. Nor is the defect cured by the subsequent averment: "Said county road having been legally established before said railroad," this being a conclusion of the pleader, and not the averment of a fact.

R. D. Hill for appellant.

P. W. Hardin for appellee.

COMMONWEALTH v. ENDERS.

Filed November 19, 1886. Appeal from McCracken Circuit Court. Opinion of the court by Judge Barbour, dismissing.

1. A nuisance in obstructing a public highway is a common law offense, and the punishment is fine and imprisonment.

2. Appeals by Commonwealth—A judgment on a verdict of acquittal in a misdemeanor case, where the offense is punishable by imprisonment, can not be reversed.

3. An appeal can not be prosecuted by the attorney-general in a misdemeanor case for the purpose of having questions of law determined. Section 337 of the Criminal Code applies to felony cases alone.

P. W. Hardin for appellant.

Sam Houston for appellee.

SWETMAN v. SWETMAN.

Filed November 19, 1886. Appeal from Lawrence Circuit Court. Opinion of the court by Judge Barbour, overruling motion for appeal.

Appeals from Superior Court—The act of March, 1886, which provides that a party shall not be entitled, as a matter of right, to an appeal from the Superior Court to the Court of Appeals unless the amount in controversy is as much as \$2,000, applies to appeals taken to the Superior Court prior to the passage of the act as well as to appeals taken since.

Alex. Lackey for appellant.

Wm. Lindsay for appellee.

CITY OF BOWLING GREEN v. POTTER, JAMES & CO.

Filed November 19, 1886. Appeal from Warren Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Municipal corporations—Right to sue for water rent—An act incorporating the Bowling Green Waterworks Co. provided that the city of Bowling Green should have the power and privilege of subscribing the whole amount of stock necessary for the building and putting in successful operation the contemplated waterworks, and that if it did so it should be entitled exclusively to all the privileges and franchises granted by the act. The city subscribed the whole amount of stock required, and constructed, and has maintained, the waterworks. Held—That it was the intention of the legislature that, in the event the city should subscribe all the stock, it should take the place of the waterworks company, and, therefore, the city, and not the waterworks company, is the proper person to sue for water rent.

2. Title of act—Amendment to city charter—An act entitled "An act to incorporate the Bowling Green Waterworks Co." is not void in so far as it

confers upon the city power to subscribe stock, and to become substituted to all the privileges and franchises of the waterworks company, although the title of the act contains no suggestion that it is an amendment to the charter of the city. An amendment, in terms, to the charter of a city is not necessary to authorize the city to subscribe stock in, or to exercise the privileges and franchises of, such a corporation.

3. Parol evidence to add to records of city council—While parol evidence may not be admissible to contradict the records of a city council, such evidence is admissible to show facts omitted to be stated on the record unless the law expressly and imperatively requires all matters to appear of record, and makes the record the only evidence. In this case the records of the city council showing that a petition for "free water" was granted, it is held that it was competent for the petitioners to show by parol testimony that they were to have the use of the water in consideration of an agreement by them to keep the pipes in repair, but the court is of opinion that the parol testimony fails to show such a contract.

Mitchell & DuBose and Richards & Hines for appellant.

J. M. Galloway for appellees.

BROWN v. YOUNG.

Filed November 17, 1886. Opinion of the court by Presiding Judge Bowden, overruling motion to correct taxation of cost.

Taxation of cost—In the progress of litigation there are many things done necessary to end the litigation, which neither party directs, the fees for which constitute what are called general costs. Such fees it is proper to tax against the successful party, who is entitled to recover them against his unsuccessful antagonist, but the fact that the unsuccessful party may be insolvent furnishes no reason why the successful party should not pay such costs.

T. N. Allen for motion.

McILVOY, &c. v. RUSSELL & AVRITT.

Filed November 19, 1886. Appeal from Washington Circuit Court. Opinion of the court by Presiding Judge Bowden, on motions.

1. Appeals—Statement—Where the statement required by section 739 of the Code conforms to the law except that the word "appellants" appears, by evident mistake, for the word "appellees," the court will not, for that defect in the statement, strike the case from the docket.

2. Where a bill of exceptions is tendered within the time provided by law, and the court takes time, the failure of the court to approve and sign the bill until a subsequent term will not be allowed to prejudice the rights of the appellant.

A bill of exceptions was tendered in March, 1884, during the term at which judgment was rendered, and the court took time. No further action was taken until March, 1885, when the court approved and signed the bill.

Held—That a motion to strike the bill from the record should be overruled.

3. A bill of exceptions must be tendered during the term when the decision is made, or the time must then be extended.

In this case a second bill of exceptions, not tendered until the second term after the decision was rendered, is stricken from the record, the time not having been extended.

W. C. McChord for appellants.

W. P. D. Bush for appellees.

MARDERS' EX'OR v. JONES, &c.

Filed November 24, 1886. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Supersedeas bond—Liability of clerk—Where an application is made to the appellate court, or one of its judges in vacation, to discharge a supersedeas because the sureties in the bond are insufficient, it is the duty of the court or judge, if the sureties are deemed insufficient and a new bond is not executed forthwith, to make an unconditional order discharging the supersedeas, and the new bond required to be executed to prevent the order discharging the supersedeas from being made must be executed before the court or judge, and not before the clerk, and if it is not good the clerk is not liable.

J. P. Helm and A. Duvall for appellant.

Wm. Lindsay for appellees.

SHERLEY & GLOVER v. BARKER.

WYATT v. SHERLEY & GLOVER.

Filed November 24, 1886. Appeals from Trimble Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming in former case and reversing in latter.

1. Payment without notice of assignment—W. made a contract with I. whereby he agreed to furnish I. with a certain portion of his farm, which I. agreed to cultivate, W. agreeing to give him a certain part of the net proceeds of the crop "for his services." I. raised the crop as agreed, and W. sold it, and paid to I.'s son his father's part of the proceeds, I. executing his own receipt therefor. Without notice to W., I. had transferred his interest in the crop, or in the proceeds, to his son, who had mortgaged it to S. and G., who now seek to recover of W. the amount paid by him to their mortgagor. Held—That, whether the contract between W. and I. created the relation of landlord and tenant, or of master and servant, I. had no interest that he could mortgage, and, therefore, his son acquired no such interest, and the mortgage executed by him was not constructive notice to W., who had the right to continue to deal with I., as interested in the crop, until he had actual notice that I. had transferred his interest.

2. Mortgage—Lodgement for record—The mere lodgement of a mortgage with the clerk does not necessarily operate as constructive notice, although it has been acknowledged and the tax has been paid; to have that effect it must be lodged for record. If it is left with the clerk with directions not to record it, or to record it or not, as he may deem expedient, it is not lodged "for record."

Trout & Peak for Sherley & Glover.

G. C. Drane and Masterson & Gaunt for Barker & Wyatt.

PARKER v. OZMENT, &c.

Filed November 4, 1886. Appeal from Marshall Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Forcible entry and detainer—In a proceeding to recover the possession of land by warrant for forcible entry, the warrant should give the name of the county in which the land is situated, and if it fails to do so it should, upon motion made at the proper time, be quashed.

2. Amendment of warrant in circuit court—A warrant for forcible detainer may, after traverse to the circuit court, be so amended as to show the county where the land is situated, as such an amendment in no way changes the case tried in the country. In this case, however, as it was within the power of the court to have imposed terms and to have required the traverser, plaintiff in the country to pay the costs up to the time he asked to amend, and as the motion to quash for this defect was made before the trial in the country, and overruled, this court can not say that the circuit court abused a sound discretion in refusing to allow the amendment to be filed, the judgment appealed from determining nothing but the costs.

Gilbert & Reed for appellant.

Dycus, Robertson & Lee for appellees.

KENTUCKY CENTRAL R. R. CO. v. FOSTER.

Filed November 24, 1886. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Barbour, reversing.

Burden of proof—In an action against a railroad company for negligently killing stock, an answer admitting the killing, but denying negligence, places the burden upon the defendant, and entitles its counsel to the concluding argument to the jury, although it is necessary for plaintiff to prove the amount of damages.

Ross & Owen and G. C. Lockhart for appellant.

Kennedy & Kennedy for appellee.

FULTON & COCHRAN v. WHITEHEAD.

Filed November 24, 1886. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Action on firm note—An action upon a promissory note executed in the firm name may be maintained against any one or all the members of the firm at the plaintiff's option.

2. Partnership—Equity—In an action upon a firm note against only a part of the members of the firm, it is alleged that the note was executed for the firm by one of its members, who is not a party; that he alone personally knows anything of the borrowing, or of any payments made upon the note; that the books were kept under his supervision, and were so imperfectly kept that defendants can gain no information from them; that since the execution of the notes the firm has been dissolved, and that the note was executed for too large a sum, but that defendants can not state how much

too large; that unless the member of the firm referred to is made a defendant, and the accounts between the plaintiff and the firm investigated, defendants can make no defense.

Held—That the answer presents no defense, and that the defendants can not ask the interposition of a court of equity for the purpose of making an investigation as to whether they have a defense.

Thomas and John Speed for appellants.

Brown, Humphrey & Davie for appellee.

HAWTHORNE, &c. v. McARTHUR, &c.

Filed November 24, 1886. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Order of injunction construed—An injunction against the officers of a street railway company, restraining them from tearing up the streets of the city and laying down a new track, is construed, in an action on the bond, as restraining the defendants from making any repairs whatever, and not merely from making such repairs as might be necessary to enable them to operate their cars by steam, although the petition seems to have contemplated only the latter.

2. Injunction bond—Right of action on—An injunction restraining an agent selected by law from doing a thing is a restraint upon the principal, as much as if he were named, and the process operating by force of law to the restraint of the real party in interest, he is entitled to maintain an action on the bond.

3. City officers—Liability on injunction bond—The officers of a city who have sued out an injunction in the name of the city, and have signed their names to the bond, can not escape liability thereon because the city did not sign the bond.

4. The damages upon injunction bonds, when not regulated by statute, must be controlled by the same general principles which are applicable to and govern courts in other actions for breach of civil duties or obligations. They must, therefore, be connected with, and follow naturally and proximately from, the act complained of.

At the time the officers of a street railway company were enjoined from making certain repairs they were running their cars, but by reason of the break caused by the work complained of they could not run them the entire length of the line; they ran cars, however, from both ends of the line, and passengers walked around the obstruction. When the injunction was sued out they stopped the running of cars from one end of the line, and reduced the fare by reason of the shortened distance. Held—That the damage sustained was the extra expense of operating the cars, during the time the injunction was in force, in the manner in which they were being operated when the injunction was sued out, and also the decrease in tolls arising from the falling off in travel caused by the break in the line for that length of time. But the decrease in tolls caused by stopping the cars at one end of the line and reducing the fare was not the proper subject of consideration, nor was it competent to prove damage to cars not in use.

J. R. Hallam, F. J. Sutton and E. W. Hawkins for appellants.

Jesse Arthur for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. JONES.

Filed December 1, 1886. Appeal from Christian Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Majority verdict—While a jury can not find a majority verdict, yet if a party, knowing that such a verdict has been found, moves the court to accept it and discharge the jury, he will not be allowed afterward to claim that a judgment should not be rendered in accordance with the verdict. Therefore, where a party moved the court to receive a majority verdict against him and discharge the jury, he can not complain, upon appeal from a unanimous verdict against him, that the court held the jury together for further consultation.

2. A verdict is not final until it is read to the jury and an opportunity offered to the parties to have the jury polled; nor until it is accepted by the court and the jury discharged from the further consideration of the case. Until these things are accomplished the jury is under the control of the court, and its action will not be interfered with unless it be shown that it has abused a sound legal discretion.

In this case, in which both a general and special verdict were returned, the court did not abuse its discretion in refusing to receive either, some of the special findings showing that they were not unanimous; nor did the court abuse its discretion in adjourning the jury to meet again for further consultation.

3. Railroads—Duties to passengers—One traveling on a freight train in charge of stock being notified at a certain point that he could leave the car in which he was traveling to look after his stock, had the right to expect that he would have a place of reasonable safety to alight upon, and the car being stopped upon a trestle which, by the exercise of ordinary care, could have been known by the company's agents, the company is liable to the passenger for an injury received by him in stepping from the car in ignorance of the danger, it being night. Nor does the finding of the jury that he failed to take "precaution" imply culpable negligence upon his part, he having the right to expect a place of reasonable safety.

John Feland & Son for appellant.

Petrie & Downer for appellee.

HOWELL v. HOPKINS.

Filed December 1, 1886. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. A person may justify a charge of assault and battery by alleging and proving that in defense of his property, and to prevent it from threatened and impending injury or destruction at the hands of the party assaulted, he used such force, and no more than was necessary, to prevent the injury or loss. And he should further show that he used all reasonable means to induce the plaintiff to leave his premises and refrain from committing the contemplated trespass before he resorted to force. Nor does the fact that the defendant had notified the plaintiff before the time of the assault not to commit the trespass dispense with the necessity of then and there endeavoring by peaceable means to prevent him from doing the act before resorting to force.

2. Measure of damages—In an action for an assault and battery the jury were properly instructed that in estimating the damages they were to consider the mental and physical suffering of plaintiff, his loss of time, his expense in effecting his cure, and such permanent injury, if any, as may have been the natural or necessary consequence of the assault, the petition and the proof being sufficient to sustain the instructions.

3. Excessive verdict—In an action for assault and battery, where the plaintiff was struck a severe blow on the mouth with a stick or club, his lip out and one of his teeth broken, and as a result of the assault suffered for several weeks and incurred a physician's bill of \$100, \$800 damages were not excessive.

Bullock & Beckham for appellant.

L. A. Weakley for appellee.

COOPER'S ADM'R v. COOPER.

Filed December 1, 1886. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, reversing.

1. The statute of limitation does not apply to, or run against, debts which, by operation of law, are set-off one against the other.

2. Assignment for benefit of creditors—Where an assignee for the benefit of creditors has a demand against one of his creditors, the assignment is, in legal effect, an appropriation by the assignor of the debt due to him to the satisfaction, pro tanto, of the debt due by him to his debtor, and as to this sum the statute of limitation does not apply.

W. B. Harrison for appellant.

Samuel Avritt for appellee.

DAVIS' ADM'R v. GOGGIN'S ADM'R.

Filed December 1, 1886. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Former adjudication—Appellant sued appellee, alleging that appellee was indebted to his intestate by note for \$1,000. Appellee answered that the plaintiff's intestate had placed \$1,000 in his hands to be loaned out by him as her agent; that he was to collect and pay her the interest and refund the principal on demand; that he did not borrow the money and did not use it. He further alleged that plaintiff's intestate had given the money in his hands and also the memorandum sued on to her mother, and that he had settled with the latter. Appellant, in his reply, tacitly admits that appellee's version of the transaction was the correct one, but denied the gift by his intestate to her mother. The verdict upon this issue was for the defendant (appellee). Appellant now sues appellee for \$1,000, which he alleges his intestate placed in appellee's hands to be loaned out, etc., the transaction alleged being the same as that alleged by appellee in the former action.

Held—That the former adjudication is a bar.

Wadsworth & Son, G. W. Adair and Cochran & Son for appellant.

Wm. Lindsay for appellee.

KAMP'S EX'OR, &c. v. HALLENBERG, &c.

WEDEKIND, &c. v. HALLENBERG.

Filed December 8, 1886. Appeals from Louisville Law and Equity Court.

Opinion of the court by Judge Barbour, affirming former and reversing latter case.

1. Construction of devise—The law favors that construction of a devise which will cause the interest to vest and not to be contingent, and also that construction which will prevent the devise from lapsing.

2. Contingent and vested legacies—When the payment of a legacy is postponed to a period subsequent to the decease of the testator, and the postponement of the time is not personal to the devisee, and is not annexed to the substance of the legacy, but refers simply to the time of payment, and is made for the convenience of the estate, the legacy vests immediately upon the testator's death, and is not contingent.

3. Postponement of payment for convenience—The rule that where the testator in this class of cases expressly forbids the separation of the funds from the estate until the time appointed by him, the legacy does not vest until then, does not apply where the payment is deferred for the convenience of the estate.

A testator directed that "on the 1st day of July, 1882," if his sister D. should be still living, his executors should "set apart \$5,000, and invest the same in mortgage notes, the proceeds thereof to be paid to her as long as she lives. Upon her death my executors are directed to invest \$3,000 of said sum in real estate" for M., another sister. The testator, by a previous part of the same clause, directed the payment of \$500 a year to his sister D. until July 1, 1882, and if she should die before that time the payment to be made to his sister M. Another clause of the will provided that the devises therein named should not take effect or be paid until the 1st of July, 1882. Held—That the language quoted, as well as other provisions of the will, make it manifest that the devise of \$5,000 to D. was to take effect upon the testator's death, and that devise being vested the devise to M. was vested, and upon the death of the latter, although before July 1, 1882, and before the death of D., her interest passed to her heirs at law.

Bacon & Stites for Kamp's Ex'or, &c.

L. C. Woolfolk and C. B. Seymour for Wedekind.

O. A. Wehle for appellees.

PRITCHETT v. DIXON.

Filed December 8, 1886. Appeal from Henderson Circuit Court. Response of the court by Presiding Judge Bowden, to petition for rehearing.

1. Separation of conclusions of law and fact—Authorities reviewed, and rule declared in *Arstman v. Thoma*, 4 Ky. Law Rep., 430, affirmed.

2. A peddler's license for the entire State confers no authority to peddle in a county other than that in which it was issued until it is endorsed "genuine" by the clerk of the county court in such other county.

3. Contracts—Violation of statute—Out of a sale which violates a penal statute no cause of action can arise. The contract is void.

M. Merritt for appellant.

Yeaman & Lockett for appellee.

DRÁNE, BY, &c. v. PAWLEY, BY, &c.

Filed December 8, 1886. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Infants—Slander—An infant under fourteen years of age is presumed to be incapable of malice, and is, therefore, not liable in slander unless the evidence is such as will rebut the presumption that he was not developed mentally sufficiently to comprehend the nature of the charge, as tending to degrade the plaintiff in public esteem, and to understand that liability would result from speaking such slanderous words.

In this case the court holds that there was no evidence to rebut this presumption as to a girl thirteen years of age.

2. Duress—The fact that the defendant was an infant, and, therefore, under the control of her parents, and under the influence of her father and elder sister, does not constitute a duress so as to make her irresponsible for slanders, especially such as were not uttered in their presence.

Bush & Robertson for appellants.

James Montgomery for appellees.

McCRACKEN v. SWART.

Filed December 8, 1886. Appeal from Fleming Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Warranty—An express agreement to assure a particular condition is a warranty, and nothing more is necessary to show that the warrantor intended to assure; but where there is no such express agreement, and certain statements are relied on as equivalent to a warranty, it must appear that they were so intended.

Ross & Owens for appellant.

FARMERS BANK OF KENTUCKY v. RANKIN.

Filed December 8, 1886. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Final order—An order referring certain matters to a commissioner and directing him as to the basis upon which he is to report is not final.

2. Where, in a contest over a certain fund, only a part of which was in court, one of the claimants moved that so much of the fund as was in court be paid to him, which motion was sustained and the payment made, the order directing the payment should be regarded as finally settling the right to the entire fund.

McKee & Finnell and A. Duvall for appellant.

Collins & Fenley for appellee.

NEW NATIONAL TURNPIKE CO. v. DULANEY, &c.

Filed December 8, 1886. Appeal from Louisville Law and Equity Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Injunction bond—Counsel fees—Counsel fees can be recovered in a suit on an injunction bond executed in an action in which a perpetual injunction was the final relief asked, although counsel was employed solely to procure a dissolution of a temporary injunction, provided it appears that counsel would not have been necessary, and would not have been employed

if there had been no temporary injunction; and in this case a petition so alleging is held good on demurrer.

2. Consolidation of turnpike companies—An act of the legislature sanctioned a consolidation of two turnpike companies made by the stockholders, which was authorized by the charter of one of the companies, and provided that the consolidation should be valid under a new name and should vest in the new company "all the powers, rights and privileges, property and franchises heretofore granted or belonging to either of said companies." Held—That the new company succeeded to all the rights of the two companies, and can maintain an action on any obligation executed to either or both of them.

C. B. Seymour and Noble, Barnett & Barnett for appellant.

P. B. Muir for appellees.

MULLINS v. TAYLOR.

Field December 8, 1886. Appeal from Kenton Chancery Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Parol testimony to vary writing—Where one agrees in writing to pay a certain sum, parol testimony is not admissible to show that the agreement was to pay the sum named in such a way as would in fact increase the amount to be paid.

2. Executory and executed contracts—An unassailed written executory contract for the sale of land, which is shown by the concurrent testimony of all parties not to have been changed, may be relied upon to prove that the deed evidencing the executed contract recites the executory contract erroneously, and that more money was paid than was due, although the vendor wrote the deed as he intended to write it, doing so under the mistaken belief that he was entitled to demand the excess.

Collins & Fenley for appellant.

Simmons & Schmidt for appellee.

WESTERN UNION TELEGRAPH CO. v. JUMP.

Filed December 8, 1886. Appeal from Grant Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Telegraph companies can not by special contract limit their liability for negligence in delaying the transmission or delivery of messages.

2. The damages which may be recovered for the breach of a contract are all the direct damages which the parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had been fully informed of the facts.

Appellee received a telegram from a distant State stating that his son had died, and asking what to do with the body. He had a telegram sent in response, asking that the body be sent to him by express, and asking an answer. Waiting a day and receiving no answer, he telegraphed asking if the body had been sent. When this telegram was received an answer addressed to appellee was delivered to appellant's operator, stating that the body had been sent, but this telegram was not delivered or transmitted until the

fourth day thereafter, appellee having in the meantime sent other telegrams, and having, the day before he received the delayed telegram, sent a man to bring home the body of his son.

Held—That appellee is entitled to recover of appellant, not only for his own trouble and expense in endeavoring to hear after he should have received the delayed telegram, but he is also entitled to recover what he paid out or agreed to pay to the person whom he employed to go for his son's body, the amount to be limited to such person's traveling expenses and a reasonable compensation to him for his time and services.

3. Appellee was the proper person to sue, the telegram having been set at his request and for his benefit.

4. Pleading negligence—The averment that the telegram was sent, and its date, together with the allegation that, by reason of the negligence in transmitting, the plaintiff was forced to employ, etc., and sustain injury, etc., is a sufficient allegation of negligence.

E. W. Hawkins for appellant.

J. J. Landram for appellee.

PHOENIX INSURANCE CO. v. ADAMS' TRUSTEE.

Filed December 8, 1886. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Insurable interest—Generally a person who has any interest in property, legal or equitable, or who stands in such a relation thereto that its destruction would entail pecuniary loss upon him or those whom he represents, has an insurable interest to the extent of his interest therein, or of the loss to which he is subjected by the casualty.

2. Assignees for the benefit of creditors have such an interest in the trust property as authorizes them to procure insurance upon it, although they have not qualified or executed bond as required by the statute, and although the deed may not have been approved by all the creditors, even where the deed is not to have full effect until then.

3. Deeds—Escrow—A deed properly executed and delivered takes effect from its delivery, and can not, by any parol agreement, be made to operate as an escrow.

4. Action by trustee—One of two trustees in whose names property was insured having resigned, the remaining trustee was the proper party to sue.

5. Insurance—Proof of loss within the time required by the policy is waived where the agent tells the insured that the loss will not be paid.

Burdett & Walton for appellant.

R. H. Tomlinson for appellee.

KENDALL, &c. v. KENNEDY.

Filed December 8, 1886. Appeal from Louisville Chancery Court. Opinion of the court by Judge Barbour, affirming.

1. Pleading—Variance—A petition which declares upon a promissory note executed by two as the note of one of the obligors, the note being joint and several in its terms, is good on demurrer.

2. Inconsistent grounds of attachment—That the defendant has disposed of his property with the fraudulent intent to cheat, etc., and that he is about to do so, are not inconsistent grounds of attachment.

3. Trial of attachment—Depositions—The defendant waived his right to object to the reading of depositions upon the trial of an attachment by failing to except until after the trial had begun, the court having given the plaintiff leave to take evidence by depositions.

4. Failure to sign orders of court—As the order granting the attachment in this case was signed before the judgment in the case was rendered, and the record before the court shows on its face that the order granting the attachment was a valid order of court, this court has no right on this appeal to go behind the record, although the proceedings show that the order was not signed until after a motion was made to discharge the attachment.

5. Verbal contracts for sale of land—Attachments—Since a verbal contract for the sale of lands is not enforceable by either party, the land may still be levied on as that of the vendor, he remaining in possession, and the levy will create a valid lien as against the vendee to the extent of what he was owing the vendor, not exceeding the debt, and subsequent attaching creditors can not defeat this lien by garnishing in the vendee's hands what he might be owing the vendor in the event they should consummate their contract. Nor is the lien affected by a subsequent conveyance by the vendor to the vendee pursuant to their executory contract.

A. C. Rucker and Richards & Hines for appellants.

Sam Cleaver for appellee.

HORNBACK, &c. v. SWOPE, &c.

Filed December 8, 1886. Appeal from Campbell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Distress—Injunctions—Sections 653 and 654 of the Civil Code afford a remedy only to the tenant, his assignee or under-tenant, for resisting an illegal or improper exercise by the landlord of his right of distress, therefore, where one seeks to enjoin another from proceeding against his property under a distress warrant, upon the ground that the relation of landlord and tenant does not exist, and the injunction is dissolved the sureties can not escape liability upon the injunction bond upon the ground that the remedy provided by sections 653 and 654 of the Code was not adopted.

2. Injunction bond—Whether a plaintiff who applies for an injunction sets up in his petition a cause of action or not the order of injunction must be obeyed until it is dissolved; and if, in consequence of the injunction, the other party has sustained damages the obligors can not escape liability.

Nelson & Washington for appellants.

E. W. Hawkins for appellees.

CHESAPEAKE & OHIO R. R. CO. v. COMMONWEALTH.

Filed December 8, 1886. Appeal from Clark Circuit Court. Opinion of the court by Judge Barbour, granting rehearing and reversing, Presiding Judge Bowden dissenting.

1. Former conviction or acquittal—In an indictment for a nuisance the allegation of time is not material, and where two indictments against the same defendant each charges the commission of a nuisance, both using the same language as to time, as well as other circumstances, a conviction or acquittal under the one does not, ipso facto, bar the other, as the judgment only bars the indictment subsequently tried as to such offenses as were proved, or attempted to be proved, upon the former trial, which, of course, can only be shown by extraneous evidence.

Therefore, as the defendant in this case, upon the trial of an indictment for obstructing a highway, to which it pleaded a former acquittal, introduced evidence tending to show that upon the trial of another indictment, substantially in the same language and covering the same period, under which it was acquitted, the Commonwealth in the examination of her witnesses covered the whole year, going through it month by month, attempting to prove at sometime in it some act constituting the offense, which necessarily involved the attempt to prove the obstruction at the time testified to by the witnesses in this case, the issue thus presented should have been submitted to the jury.

2. Nuisance—Indictment—The use of the word "habitually" in charging the offense in one of the indictments was mere surplusage, and its omission from the other indictment did not make the offense charged therein of a different character from that charged in the former indictment, and the same evidence which would authorize a conviction in the one case would authorize a conviction in the other.

3. The charge of a continuing nuisance in an indictment is not allowed except for the purpose of enabling the court upon conviction to abate the nuisance.

Breckinridge & Shelby for appellant.

C. J. Bronston for appellee.

MARKSBERRY v. BEASLEY.

Filed December 8, 1886. Appeal from Grant Circuit Court. Opinion of the court by Judge Ward, affirming.

1. An officer is not responsible in damages for anything which he may do as an officer unless he acts without authority, or from corrupt motives, or malice, knowingly doing that which is wrong.

2. Where a judicial officer assumes jurisdiction when he has none, he is liable for his acts, and the motive in assuming jurisdiction is only important as it gives color to the act and affects the damages. But if there is jurisdiction there must be more than error; there must be error superinduced by corruption or malice, one or both.

3. A justice of the peace, or an officer having the same jurisdiction, has the power to secure obedience to the orders of the court, in a case of which it has jurisdiction, by punishment for contempt, and although the court in

this case may not have had power to impose a fine exceeding \$3, it had the power to impose four separate fines of \$3 each.

H. Clay White and W. W. Dickerson for appellant.

BRIDWELL v. MOORE.

Filed December 8, 1886. Appeal from Hardin Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Bailment—"Accidents"—An effect which is produced by a negligent act is not an "accident," and the bailee of property can not, by contracting that he is not to be liable for accidents, relieve himself from liability for injuries which are caused by, or result from, his negligence.

2. Evidence—In an action against the bailee of a horse to recover for injuries thereto caused by his negligence, testimony to the effect that certain persons treated their horses just as the defendant was shown to have treated the horse intrusted to his care was improperly admitted. Isolated transactions collateral to the one in issue are never competent as illustrative of the matter being investigated. The witness must be able to know how people engaged in the business in question generally act, and by that standard express his opinion.

J. P. Hobson for appellant.

Montgomery & Poston for appellee.

HOBBS v. PEMBERTON, &c.

Filed December 8, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Guardian and ward—Where a guardian receives the proceeds of his ward's real estate in an action instituted by him for the sale thereof and for a reinvestment of proceeds, and fails to account for the money so received, his sureties are liable, although there were defects in the sale, those defects being such as might have been corrected at any time by a proceeding to perfect the title.

2. Value of life estate—Even if a guardian having a life estate in the real estate of his wards, which he has procured to be sold under a decree that there may be a reinvestment of the proceeds, may, by application to the chancellor, have the present value of his life estate paid to him out of the proceeds, his sureties can not, after his death, make the election and claim a credit for the value of his life estate on the day of sale.

3. Parent and child—The allowance to the father, as guardian, of \$50 per annum for the support of each of his children, from the time the money came to his hands until the child arrived at the age of twelve years, was, under the circumstances of this case, a reasonable allowance.

George W. Jolly for appellant.

SOUTHERN MUTUAL LIFE INS. CO. v. BEST.

Filed December 8, 1886. Appeal from Jessamine Circuit Court. Opinion of the court by Judge Ward, affirming.

Insurance—Nonpayment of premium note—The agent of an insurance company had an arrangement with his principal whereby he was authorized

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to take the note of the insured payable to himself for the cash premium, the company to charge him with the amount, and if the note was not paid to him he was to have the right to turn it over to the company and receive credit therefor.

Held--That a note thus taken by the agent payable to himself, and afterward turned over to the company, was not "a note given for a premium" within the meaning of the provision that in case of default in the payment of any premium "or any note given therefor" the policy should become void.

Wm. Lindsay for appellant.

George Denny, Jr., for appellee.

LASWELL v. JOHNSON.

Filed December 8, 1886. Appeal from Hardin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. In an action on a guardian's bond it is not sufficient to allege that the bond executed by the obligors, naming them, was duly approved, etc. The fact that the execution should be alleged, not the conclusion of the pleader that the bond has been executed.

2. A settlement between guardian and ward outside of court is not prima facie evidence against the surety of the guardian, therefore, in an action on the bond it must be alleged that the guardian's settlement was made in the county court.

James Montgomery for appellant.

Irwin, Bush & Robertson for appellee.

ASHLEY, &c. v. MILLETT.

Filed December 15, 1886. Appeal from Daviess Circuit Court. Opinion of the court by Presiding Judge Bowden, overruling motion to file affidavits.

1. Appeals—Right to show value in controversy—Upon an appeal by the claimant of attached property from a judgment rejecting his claim the court will not, for the purpose of giving jurisdiction, allow affidavits to be filed to show the value of the property to be over \$100, the record not disclosing the value. The claimant may, in such a case, pertinently allege in his petition the value of the property, since he is entitled to a judgment for its value if the thing itself can not be had, and, therefore, the claimant thus having the right to make the record show on its face that the appellate court has jurisdiction, the court will not, if he fails to exercise that right, allow the value to be shown by affidavits.

2. The claimant of attached property by filing his petition in the attachment suit thereby becomes a party to the action, and his petition, which is taken as his answer, will stand confessed if not pleaded to by the plaintiff.

R. S. Todd and Richards & Hines for appellants.

W. N. Sweeney & Son for appellee.

MARKSBERRY v. BRAMLETTE.

Filed December 15, 1886. Appeal from Grant Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming. Judge Ward, dissenting.

Order of delivery—Bonds—The sheriff has no right to comply with an order for the delivery of personal property issued under section 181 of the Code until the plaintiff has executed the bond required by section 184, and the record failing to show in this case that such a bond was executed, it

must be assumed that there was none, and, therefore, a bond taken by the sheriff from the defendant under section 188 of the Code was void, and the case stood as if the plaintiff had not attempted to get possession of the property pending the action. The plaintiff, therefore, had the right to dismiss his action, although he had in the meantime improperly obtained the possession of the property.

H. Clay White and W. W. Dickerson for appellant.

BROCK'S HEIRS v. ELLIOTT.

Filed December 15, 1886. Appeal from Laurel Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Usury—Where interest at a greater rate than that allowed by law is in fact a part of the consideration for land it is not usurious, but it is so when charged as interest on deferred payments until their maturity.

2. Assignment of usurious note—E. assigned to L. a note of B. which contained nothing but usury. B renewed the note by executing a new note to L. Upon this note L. endorsed that it belonged to E., the latter returning to L. the consideration paid him for the note of which this was a renewal. In an action by E. against B. upon the note, Held—That the note is not enforceable in the hands of E., even though B. might have been estopped to plead usury as against L. by reason of assertions made to him.

W. R. Ramsey for appellants.

R. L. Ewell for appellee.

CALLOWAY v. CALLOWAY.

Filed December 15, 1886. Appeal from Laurel Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Divorce—Abandonment—The charge of abandonment for one year, made in a petition as ground for a divorce, may be sustained by the testimony of one witness.

2. Great respect should be given to the judgment of the court below in all cases, but particularly to a judgment refusing a divorce.

3. Divorce—Collusion—As the defendant in this action by his wife for a divorce not only accepted the service of summons, but without notice appeared and consented to the taking of depositions, and failed to ask a single question of the witness, the case smacks too strongly of collusion to authorize this court to reverse the judgment of the lower court dismissing the petition.

Brown & Jones for appellant.

COMMONWEALTH v. KELLAR.

Filed December 15, 1886. Appeal from Louisville City Court. Opinion of the court by Judge Barbour, reversing.

1. The Louisville City Court has jurisdiction of prosecutions for keeping disorderly houses.

2. Disorderly houses—If the owner of a house rents it to another to be kept and used as a disorderly house, and it is so kept and used, he is, in legal contemplation, himself the keeper of such disorderly house.

3. Aiders and abettors—The offense of keeping a disorderly house is a

common law offense and a misdemeanor, and the rule that those who aid and abet, as well as the actual participants, are all principals, which applies to misdemeanors in general, applies to this offense.

W. R. Abbott and P. W. Hardin for appellant.

Alpheus Baker for appellee.

HILL v. MOORE, &c.

Filed December 15, 1886. Appeal from Henderson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. The heir can not sue to recover a debt due the decedent, although he alleges that there is no administrator, and that the decedent owes no debts.

2. Maintenance of step-children—Where the step-father voluntarily assumes the control of his step-children he stands to them in the place of a father, and it becomes his duty to maintain them thus. But on account of his needy circumstances the chancellor may, when a proper case is shown, allow him compensation for their maintenance. In this case, as the husband and wife at the time of their marriage each had children, it must be assumed that the husband undertook to maintain the wife's children in consideration of her care of his children, and he can not be allowed anything for the maintenance of her children during her life, but he, being a poor man, dependent upon his daily labor for a support, is entitled to compensation for their maintenance from the time he qualified as their guardian, which was about the time of their mother's death, they being entitled to credit for the value of their services.

Clay & Banks and Yeaman & Lockett for appellant.

W. P. McClain and Montgomery Merritt for appellees.

PUSEY v. COMMONWEALTH.

Filed December 15, 1886. Appeal from Louisville City Court. Opinion of the court by Judge Barbour, affirming.

1. Indictment—An offense against a penal law of the State, the punishment for which may exceed a fine of \$100 or imprisonment for thirty days, can not be prosecuted by a warrant or summons, but only by indictment.

2. City courts—Grand jury—The Louisville City Court has the power to empanel a grand jury to inquire into and present indictments for indictable offenses of which it has jurisdiction, and it is not necessary that the grand jurors should be selected by jury commissioners.

3. A grand jury empaneled in the Louisville City Court is properly styled in an indictment found by them as "the grand jury of the city of Louisville."

4. An indictment found in the Louisville City Court for an offense of which that court has jurisdiction, when committed within the limits of the city, need not state the county in which the offense was committed; it is sufficient to charge that it was committed in the city of Louisville.

Whittaker & Parsons for appellant.

W. R. Abbott and P. W. Hardin for appellee.

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IN MEMORIAM—M. C. JOHNSON.

Madison Conyers Johnson died on the 7th of December, 1886, at his home in Lexington, Ky., after a painless illness of but a few days.

He had lived a long, a useful and an honored life. His years had been lengthened out beyond four score. They had been filled with labors that benefited his people, and disciplined with a self-control and habit of justice that instructed all who knew him. They had been replete with that noble toil which gathers knowledge. They had been marked with that generous liberality which freely dispenses to others the gathered fruits of long-continued industry. He died in the midst of his unimpaired usefulness, while he was yet the counselor and guide of the community, before decay had diminished his intellectual vigor, or bodily infirmity had lessened his zest for life.

He was the son of William Johnson and his wife, Betsy Payne, and drew his descent, both paternal and maternal, from the sturdiest of pioneer families.

Robert Johnson, his grandfather, was one of the first settlers of Kentucky, an able, resolute and untiring man, greatly trusted in many ways throughout a long life. He represented Fayette county, of the District of Kentucky, in the Virginia

legislature of 1782. He took part in the district convention of 1785; was a member of the constitutional convention of 1792; and again of that which assembled in 1799. He repeatedly represented Scott county in the State legislature. Tradition pictures him as a man of very clear judgment and evenly-balanced mind, consulted upon all important matters, and justifying the confidence reposed in him.

The family of Robert Johnson were inmates of Bryant's Station when Girty attacked that place in 1782. His wife was one of the matrons who made the perilous venture of passing the Indian ambuscade to bring a supply of water from the spring outside the stockade. His infant son, Richard M. Johnson, afterwards a vice-president of the United States, but even more famous as the slayer of Tecumseh, was rocked in his rude cradle during the siege. The nurse, a sister, nine years old, seized the moments when her little charge fell asleep to do her part in the gallant defense, and, with her brother William, aged seven years, went from place to place with buckets of water and gourds, extinguishing the flames lighted by the fire-arrows of the Indians.

This introduction of William Johnson to the realities of war and this courage of his infant days were prophetic of his future. In 1813 he led the Kentucky troops that relieved Fort Meigs and saved Harrison's army. The exposure of the campaign induced disease that ended his life within the year.

The care of his infant family devolved upon his young widow, daughter of Major Henry Payne, of honorable revolutionary distinction, well fitted to train her children in the ways of rectitude and usefulness. The strength of her character and the soundness of her judgment were as noticeable as the tenderness of her maternal affection. A reverential and sober habit of thought characterized her, and was reflected in her son. It is the greatest proof of her excellence that her children preserved toward her, through life, the affection of their youth, and manifested, to their latest years, increasing veneration for her character and respect for her opinions.

Of this parentage Madison C. Johnson was born on the 21st day of September, 1806. The place of his birth was his father's farm in Scott county, about one and a half miles southwest of Georgetown, on the road that leads to Frankfort. There he passed his infancy and early childhood.

In 1819 his mother became the wife of Mr. John Allen, of Fayette county, whose affectionate care was never forgotten. Stepbrothers and half-brothers grew to manhood, and passed through life as one harmonious family.

At the home of his stepfather, three miles from Lexington, on the Harrodsburg road, he spent the remainder of his youth, attending the country school of the neighborhood, reading much and with attention and concentration of mind. In boyhood, as in after life, he manifested the faculty of long continued consecutive thought, and proved himself equal to the most difficult self-imposed tasks. He appeared to the casual observer to be slow of mind, but the error was speedily dispelled when comparison of progress was made among the pupils. The vigor and perspicuity of his thought, and the accuracy and extent of his information, was admitted by all his fellows, and was the pride of his preceptor. He conquered his want of success in boyish sports by exploring minutely the course of training pursued by the Greek athletes, and had the resolution to adhere to a course of exercise, pursued so unostentatiously that his comrades did not suspect it, which gave him the first place in contests of fleetness and strength.

At the age of sixteen he entered Transylvania University, and in 1823 graduated under the presidency of Doctor Holley, the easy head of a class of thirty-three.

He early chose the profession of the law, and after leaving college became a pupil of Martin D. Hardin, then the leading practitioner at the appellate bar. Mr. Hardin enjoyed the unbounded confidence of the courts and the people. His habitual accuracy was such that his statements of fact or quotations of authority went unchallenged even in argument. He

had the faculty of concentrating all his powers upon whatever for the time engaged his thoughts.

Under his instruction Mr. Johnson's intellectual characteristics were doubtless greatly strengthened. He confessed the permanent influence of Mr. Hardin's teachings and example; and their effect was manifest. The mantle of the preceptor was transmitted to the pupil. After the death of Mr. Hardin, Mr. Johnson read with Robert Wickliffe, and under his supervision completed his professional preparation.

The admission of Mr. Johnson to the bar in 1825 was the occasion of a debate conducted with warmth and ability by prominent men of the time. His license was granted by the old court, and bore the signatures of John Boyle, Chief Justice, and William Owsley, Associate Justice.

His application to be sworn as a member of the Fayette bar upon this authority was refused by Judge Bledsoe, but he was admitted upon the license of two circuit judges. In the Woodford Circuit Court Judge Kelly heard arguments by Crittenden, Wickliffe and Robertson in support of the validity of the license signed by Boyle and Owsley. Solomon P. Sharp and T. B. Monroe attacked it as a nullity, and its signers as pretended judges. The discussion was an interesting episode of the old and new court controversy that then convulsed the State, but a direct decision was evaded by reserving the question to the following term, and then admitting Mr. Johnson, as had been done in Fayette, without reference to the power of the old court.

Mr. Johnson's success at the bar was soon assured. His accurate and intelligent preparation and management of cases made him a favorite junior with the older members of the profession. He rapidly came to the foremost rank, and for full forty years had confessedly the first place at the Kentucky bar. At one time he contemplated settling at Frankfort, and confining his attention to appellate practice, but his decision was soon made to fix his abode at Lexington.

He married in 1828 a daughter of Gen. Green Clay, and was left a widower within a year.

It was after the year 1840 that Major Johnson recognized the fact that even his vigorous constitution could be overtaxed. He had acquired a handsome competency, far exceeding the demands of his simple personal wants, and sufficient to indulge the liberal benevolence that marked his life. He purchased the place which he made his home for more than forty years. Here he found recreation from his professional labors, in the midst of fruits and flowers planted by his own hand, and tended with his own care. The healthful diversion which he found in his gardens and grapery and green houses stimulated his acquisition of varied and extensive knowledge in the sciences, carried with unwearying interest into the great problems that have engaged modern thought. As his years increased and he retired gradually from the more engrossing cares of general practice, he retained his interest in the law and continued to be the trusted counselor, consulted in important affairs as the leader of the bar, and patiently advising the poor and the obscure in their troubles.

The leisure of his later life was never perverted to idleness. He gave of his time and attention to the affairs of his city, serving for many years, and to the day of his death, in its municipal council, guarding the management of its finances, and personally overlooking all that concerned its welfare. He identified himself with the direction of the Northern Bank of Kentucky, and with scrupulous fidelity devoted himself to the daily discharge of his duties as its president. A multitude of trusts centered in his hands. Still he found leisure to ponder deeply upon affairs of national importance, and to furnish the material and suggestion for important legislation. His unobtrusive thought lay at the foundation of some of the most beneficial financial measures of the Federal government.

And withal there was time for those pleasant meetings in the afternoon at his home, when the little company of friends

who knew him best and loved him most used to gather in reunions which the survivors can never forget.

Major Johnson steadily abjured all ambition of mere place or notoriety. He recognized, and with all his might performed, the duty of the good citizen. He shrunk from nothing that duty demanded. He served his country, his State, his county and his town heartily and well. The duty that was before him he did with simplicity and fidelity, and he felt and met the responsibility imposed by his talents and the confidence of his people.

The reputation of Major Johnson as a lawyer will rest chiefly in tradition. He took no great care to perpetuate his fame. It satisfied him that he did thoroughly well whatever he was called to do. His best productions were in the form of oral argument, such as he made in *Todd v. Wickliffe*, or in the hardly less ephemeral form of a printed brief, as was his masterly petition for rehearing in the case of the *Commonwealth v. T. C. Jones*.

Such must be the fate of professional eminence. The story of all great lawyers is the same.

His clear discernment preferred the affection and confidence of the community to mere applause. He deliberately chose the cooler and more sequestered paths of a diligent and useful life rather than the unsatisfying and selfish career of mere ambition. He gathered knowledge that he might be the better citizen and the more useful counselor. He acquired fortune that he might be independent and free to indulge a wise benevolence. He bound friends to him with hooks of steel, that the memory of his wisdom, his veracity, his kindness might live in their hearts.

He died a fortunate man. His mind retained its vigor, his body was spared all rack of agony. Surrounded by those who were the chosen friends of his latter days, he passed away in a sleep tranquil as that of an infant.

JOHN MASON BROWN.

KENTUCKY COURT OF APPEALS.

METCALF v. COMMONWEALTH.

(Filed November 27, 1886.)

Appeals—Filing of transcript in felony cases—The Court of Appeals is utterly without jurisdiction to try an appeal in a felony case where the transcript was not filed within sixty days after judgment and no order made within that period extending the time for filing. The irregularity is not, therefore, one that may be waived by the failure of the appellee to take advantage of it before the submission for argument or hearing on the merits; nor has the Court of Appeals the power, after the expiration of the time provided by law for filing the transcript, to make an order extending the time.

The case of Mackey v. Commonwealth, 4 Ky. Law Rep., 179. in so far as it is in conflict with this, is overruled.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Lewis.

May 13, 1886, Wm. Metcalf was, under an indictment for a felony, found guilty, and judgment rendered against him. And October 23 he made a motion in this court to have a transcript of the record of the case then filed, and his appeal docketed and set for trial.

The jurisdiction of the Court of Appeals in prosecutions for felonies exists alone in virtue of article 1, chapter 1, title 10, Criminal Code, and, in the language of section 334, it exists subject to the restrictions contained in that article.

Section 336 is as follows: "An appeal may be taken by the defendant in the following manner only:

"1st. The appeal must be prayed during the term at which the judgment is rendered, and the prayer noted in the record in the circuit court. The appeal shall be granted as a matter of right.

"2. When an appeal is prayed the court shall, if the defendant desire it, make an order that the execution of the judgment be suspended until the expiration of the period within which the defendant is required to lodge a transcript

of the record in the clerk's office of the Court of Appeals. After the expiration of such period the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment the certificate as provided in subsection 3 of this section, that the appeal has been taken, or a copy of an order of the Court of Appeals granting further time to lodge the transcript.

"2d. The appeal is taken by lodging in the clerk's office of the Court of Appeals within sixty days after the judgment a certified transcript of the record. The clerk of the Court of Appeals shall thereupon issue a certificate that an appeal has been taken, which shall suspend the execution of the judgment until the decision upon the appeal.

"4th. If time be given beyond the term at which the judgment is rendered to present a bill of exceptions, the transcript of the record may be filed in the clerk's office of the Court of Appeals within sixty days after the bill of exceptions is made part of the record."

As said in the case of *Stratton v. Commonwealth*, 8 Ky. Law Reporter, 78, "it seems clear to us that, in order to give the Court of Appeals jurisdiction in a felony case, a certified transcript of the record must be filed in the clerk's office within sixty days after the judgment, or, in a state of case provided for in subsection 4, within sixty days after the bill of exceptions is made part of the record, unless an order be made by the Court of Appeals granting further time to lodge the transcript."

But no time was asked by the defendant in this case or given by the court trying it to present a bill of exceptions, but it was filed and made part of the record at the same term the judgment was rendered, consequently more than sixty days before the motion we are now considering was made. Nor was an order made by this court, or applied for by the defendant, within sixty days after the judgment, or after the bill of exceptions was made part of the record, granting further time to lodge the transcript.

As the appellate jurisdiction of the Court of Appeals in prosecutions for felonies is made subject to the restrictions

contained in the article of the Code mentioned, and section 336 provides explicitly that an appeal may be taken by the defendant in the manner therein indicated, and in no other, we are utterly without jurisdiction to try any such case that has not been brought before us in substantial compliance with the terms of the law. Nor have we now authority to grant further time within which the transcript of the record in this case may be filed. For the language of the Code is that after the expiration of the period within which the defendant is required to lodge a transcript of the record in the clerk's office of the Court of Appeals, the judgment shall be executed unless the defendant shall have filed in the clerk's office of the court rendering the judgment the certificate of the clerk of the Court of Appeals that an appeal has been taken, or a copy of an order of the Court of Appeals granting further time to lodge the transcript.

No other interpretation can be given to this language than that the order granting further time to lodge the transcript must be applied for and made before the expiration of the period within which it is required to be lodged. Certainly no authority is given to this court to make the order after the expiration of that period, nor to entertain an appeal until the transcript of the record is, as required by the Code, lodged in the clerk's office of the Court of Appeals.

It was held in the case of *Mackey v. Commonwealth*, 4 Ky. Law Rep., 179, that the failure to file the record in the clerk's office of the Court of Appeals, in a felony case, within sixty days after judgment does not affect the jurisdiction of the court to hear the appeal, and unless taken advantage of before the cause is submitted for argument or hearing on the merits the irregularity is to be treated as waived.

But this decision was made under a misapprehension of the proper meaning and application of the provision contained in subsection 1, section 336, that "the appeal shall be granted as a matter of right."

By reference to section 329 of the preceding Criminal Code it will be seen that to take an appeal in a felony case it was

not only necessary to lodge the transcript of the record in the clerk's office of the Court of Appeals, but it was also required that there should be a certificate of the allowance of the appeal endorsed on the transcript under the signature of one of the judges of the Court of Appeals. And by section 330 it was provided that in case the judge applied to refused an appeal it could not be taken.

But that condition has been omitted from the present Code, and instead the provision is made that the appeal in cases of felony shall be granted as a matter of right, and not be longer dependent upon the action of a single judge of the Court of Appeals. And now the right of appeal in felony cases is dependent simply upon the conditions and restrictions provided in article 1, which in no substantial manner differs from the provisions of either the former or the present Code in regard to appeals in cases of misdemeanor.

If this court may take jurisdiction of felony cases after the expiration of the period mentioned in section 336, it follows that, contrary to the obvious policy and reason of the law regulating criminal prosecutions, as well as the meaning of the language used, the jurisdiction of the Court of Appeals is not subject to the restrictions contained in the Criminal Code, but is regulated by its own discretion.

In our opinion the period mentioned was intended by the legislature to constitute a limit of the right of appeal as well as of the suspension of the execution of the judgment. And consequently this court has now no jurisdiction of the case before us, and the motion must be denied.

In so far as the case of *Mackey v. Commonwealth* conflicts with this it is overruled.

H. T. Wilson for appellant.

ALFORD v. COMMONWEALTH.

(Filed December 11, 1886.)

An indictment against appellant for murder charged that he "willfully,

and of his malice aforethought, feloniously did kill and murder one Frank Wheeler, by cutting and wounding the said Frank Wheeler with a knife, a sharp-edged instrument and deadly weapon," and then added, "from which said cutting and wounding the said ——— did then and there die."

Held—That the indictment was sufficient without the words last quoted; but if not, it is conclusive from the preceding part of the indictment that "said ———" refers to no one but Frank Wheeler.

Appeal from Jefferson Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was tried in the Jefferson Circuit Court for the murder of Frank Wheeler, and was convicted of manslaughter, and his punishment fixed at confinement in the State penitentiary for the term of six years. The circuit court having overruled his motion for a new trial, he has appealed to this court.

The only ground seriously urged by his counsel for a reversal is that the indictment under which he was tried and convicted is insufficient.

The indictment in plain, concise, direct and certain terms, "accuses William Alford of the crime of willful murder, committed in manner and form as follows, to wit: The said William Alford, in the county of Jefferson, 28th day of March, 1880, willfully, and of his malice aforethought, feloniously did • kill and murder one Frank Wheeler, by cutting and wounding the said Frank Wheeler with a knife, a sharp-edged instrument and deadly weapon;" and then adds "from which said cutting and wounding the said — — ——— did then and there die."

The objection to the sufficiency of the indictment consists in the fact that the name of the person, immediately after the word "said" in the last line above quoted, was left blank.

The language of the indictment, commencing with the words "from which" and ending with the word "die," may be stricken out, and then the indictment is sufficient, because it charges that the appellant, on the 28th day of March, 1880, did "feloniously, willfully, and with malice aforethought, kill and murder Frank Wheeler," by cutting and wounding him with a knife, a sharp-edged instrument and a deadly weapon.

Besides, it is conclusive that no one but Frank Wheeler could have been referred to in the blank. He was the only person mentioned in the preceding part of the indictment as having been cut, wounded and killed by the appellant, and the words "said — —" could refer to no person except him.

The evidence shows that appellant and Frank Wheeler, and a companion of Frank Wheeler, had some difficulty on the night of the killing, in a saloon, and that Wheeler and his companion were in the wrong; that appellant and Wheeler agreed to go out on the street and fight; they did go, and Wheeler's companion accompanied them. In a very short time after they went out Wheeler's throat was cut, from which he died immediately, and the appellant was cut in the face. One witness says that he was standing near by when the fight occurred, and that he saw one of the men put his arm around the neck of the other and strike, and instantly the blood spurted from the person struck. This witness was contradicted in some particulars by another witness. But the fact nevertheless exists that appellant and Wheeler went out on the street to fight, and immediately after getting on the street Wheeler's throat was cut and appellant was cut in the face. It is certain that either appellant or Wheeler's companion killed him. The jury believed that it was appellant. We are of the opinion that the conclusion of the jury was right.

The lower court did right in refusing to instruct the jury to find for the appellant.

The court's instructions given to the jury are clearly correct.

The judgment is affirmed.

Kinney & Kinney for appellant.

P. W. Hardin for appellee.

CAMP v. MOREMAN.

(Filed December 15, 1886.)

1. Statute of frauds—Agreements for sale of land—A written agreement between parties by which one sells to the other land, describing it, is a suffi-

clent memorandum to take the case out of the statute of frauds, and the amount of the consideration and the time of the payment may be shown by parol.

2. Case adjudged—Vendor and vendee signed a contract for the sale of land, describing the land and fixing the amount of the consideration, the writing providing, however, that the time of payment should be fixed by the vendee and one who held a lien on the property. Soon thereafter the vendor and the vendee applied to the lien holder, who signed a writing agreeing to take one-third in cash and the balance in one and two years, with interest, to which all parties assented, and both writings were delivered to the vendee.

Held—That the original writing was sufficient to take the case out of the statutes of frauds; but if not, the two writings together are sufficient, as both writings are to be considered as one.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Camp, being the owner of a tract of land in the county of Jefferson, sold it to the appellee, Moreman, by a written contract signed by both parties, for the sum of \$1,-550, the payments to be fixed on such time as the appellee and the Mutual Insurance Co. might agree. This was in substance the written agreement, and the insurance company having a lien, by mortgage, on the land, it was necessary to consult its wishes as to the time of payment. In a day or two after the contract was made Moreman and Camp applied to the officers of the insurance company, and they signed a writing agreeing in substance to take one-third cash and the balance in one and two years, with interest, to which all the parties assented, and both writings were delivered to the appellee, Moreman.

The latter refused to comply with the contract, and Camp instituted this action for a specific performance. A demurrer was sustained to the petition on the ground that the contract was within the statute of frauds, and the case dismissed.

The chancellor below held: First, that as the first writing signed by Camp and Moreman did not fix the time of payment, but left it open, it failed to satisfy the statute; second, that the writing signed alone by the insurance company did not supply the defect, because it could not be connected with the original contract without the aid of parol testimony; that if

the writing signed by the insurance company had also been signed by Moreman it might then be held to be one contract.

We can not concur with the chancellor in the reasons assigned for refusing the relief or in the conclusion that the contract is within the statute of frauds.

The statute reads: "No action shall be brought to charge any person upon any contract for the sale of real estate or any lease thereof for a longer term than one year, unless the contract, * * * or some memorandum or note thereof, be in writing, and signed by the party to be charged therewith, or by his authorized agent, but the consideration need not be expressed in the writing; it may be proved, when necessary, or disproved by parol or other evidence."

Here the terms of the contract, including a description of the land sold and the price to be paid, and the agreement that the Mutual Insurance Co. should regulate the time of payment, are fully set forth in the writing. This was a full and complete contract between these parties, and contained all the stipulations by which the one sold and the other purchased. If the insurance company had refused to give its consent to accept the notes of the appellee, or to fix the time of payment, the contract would have then terminated, not because it was within the statute of frauds, but because the party holding the lien declined to accept the notes of Moreman, or to agree with the parties as to when the payments should be made. Is not the written consent of the company, signed and delivered to Moreman, a part of the original contract, as much so as if the officers of the company had been present and signed the original contract when made? If the two had been joint owners of the property, instead of one holding a lien only, and Camp had sold the entire tract, provided the insurance company would consent, and Moreman, on producing the contract between himself and Camp, obtained the signature of the company giving its assent to the sale, and then took possession of the paper, would not this have made the company a party to the original contract?

Here the insurance company had a lien only; the vendor

and vendee have agreed on the price, and all that is wanting is the consent of the company as to the time it wants the lien discharged, and this being a part of the original contract, when Moreman applies to the company and it fixes the time and delivers the writing to Moreman, to which he consents, it becomes at once a part of the original transaction, and could be forced by the appellee against both Camp and the insurance company. Suppose the contract price had not been embodied in the contract in any way, but the writing evidencing simply a sale of the land by Camp to the appellee. It would then have been competent to allege and prove by the vendor the consideration, and in doing so there would necessarily be involved the time of payment. The statute expressly provides that the consideration need not be expressed in the writing; it may be proved when necessary, or disproved by parol or other evidence.

An agreement between parties, by which one sells to the other land, describing it, is a sufficient memorandum, if in writing, to take the case out of the statute, and an averment of the consideration may be made upon a petition for specific performance, and shown by parol.

In the case of *Stark v. Wilson*, 3 Bibb, 476, the parties in settling a controversy in regard to land referred the matter to certain arbitrators, the decision affecting necessarily the title as well as the value of the land; they found that the arbitrators they named refused to act, and by parol they substituted others. It was held that this did not alter the rights of the parties under the written contract, but only related to and regulated the manner of ascertaining the value of the land, and the case was not within the statute of frauds.

In *Ellis v. Bray*, 79 Missouri, 227, the memorandum was as follows: "Received of Daniel Ellis the sum of \$165, to apply as purchase money on a half interest in the following lands" (describing them). It was held competent to show by parol what was the full amount of the consideration, and when payable.

In this case there were two writings: The first, between the

vendor and the vendee; the second, from the lien holder entitled to the money, who, by the terms of the original agreement, was to fix the time of payment. It did so, and both writings were accepted, and are binding on the parties.

We are aware that cases may be found under the English statute, and in some of the States where the statute of frauds is similar to ours, holding a contrary rule, but the rigid and strict construction of its language has never been followed by this court, the object of the statute being accomplished when the land sold is sufficiently described in the written agreement to enable the chancellor to decree the conveyance without resorting to parol evidence for that purpose, and there are exceptions even to this rule. The language used by some of the writers on this subject, and that may be found also in the opinions of this court, to the effect that the entire contract must be set forth so as to enable the court to enforce its terms, without parol proof to aid him, is not the correct rule. A bond for title signed by the party to be charged may be specifically enforced where the thing sold has been described with sufficient certainty to enable the chancellor to know what particular land has been sold, for if this is not required, then the purposes for which the statute was enacted, viz., to prevent the fee simple title to land from passing by mere parol, to be established by what persons have heard in the neighborhood, or by those whose recollections are to be refreshed as to the land sold, the character of title to be made would prove ineffectual. The title and right of such property would be always insecure if dependent upon the memory of those professing to have a knowledge of the contract, as in case of chattels.

When the writing shows the land sold, the consideration may be established by parol; that is, the amount and when to be paid. In this case, however, both writings are one, and if not, the right of the appellant to enforce the contract upon the facts alleged is manifest.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

James S. Pirtle for appellant.

C. B. Seymour for appellee.

NOLAND v. CHAMBERS.

(Filed December 4, 1886.)

To create a separate estate in a married woman there must appear from the language used a plain purpose to divest the husband of his marital rights. Therefore, where a testator by a devise to one daughter limited her right to dispose of the estate devised, and by a devise to another daughter gave her the right "to make whatever disposition of it she may think proper," the latter devise did not create a separate estate, the manifest intent of the testator being simply to show that it was intended to be absolute as distinguished from the qualified devise to the other daughter.

Appeal from Madison Circuit Court.

Opinion of the court by Chief Justice Pryor.

The subject-matter of this controversy is the construction of the last will of John Noland, by which he made various devises to his children, and among them was his daughter, Eleanor Chambers, and the question is whether the devise to Eleanor was a general or separate estate. She died without children, devising the property willed to her to some of her next of kin, excluding others, and those claiming as her heirs at law maintaining that she being a married woman when the will was executed, it passed no title to the devisees.

Her father, John Noland, by his will directed his land to be sold, as well as other property, and the proceeds divided between his children. In regard to Eleanor he says: "It is my will that my daughter Eleanor's portion be paid to her to make whatever disposition of it she may think proper." As to his daughter Temperance he provides in the next clause of the will as follows: "It is my will that my daughter Temperance's portion be paid over to the guardian of her children (naming them) for their special benefit."

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These are the only provisions of the will from which the intention of the testator is to be ascertained as to the manner of holding by his two daughters. We think it manifest that the only purpose of the testator in making the devise, as we find it, to his daughter Eleanor was to show that he had given to her an absolute estate as distinguished from the devise he was proceeding to make of that portion to which Temperance would have been entitled if the same language had been used.

The separate estate of a married woman is that alone of which she has exclusive control, independent of her husband, and the proceeds of which she may dispose of as she pleases, or, as said by this court in the case of *Shackleford v. Collier*, 6 Bush, 157, it is such estate of a married woman as has been vested in her for her separate use to the exclusion of her husband's marital rights therein; and while no particular form of words is necessary to create the estate, it must appear that the intention was to pass the title to the feme covert for her own benefit to the exclusion of her husband. There are no words of exclusion in the will of John Noland, and the language "to dispose of as she pleases" but vested her with an absolute title that in no manner excluded the husband from his marital rights, either during coverture or as her survivor. In some of the older authorities the words to be at her disposal have been held to create a separate estate, but this will be found in the construction of wills or instruments where the meaning given the words is aided by other provisions of the writing showing the testator's intent, but whether so or not, under the decisions of this court there must appear from the language used a plain purpose to divest the husband of his marital rights, and to construe a will, as in this case, where the testator is vesting an absolute title in the one daughter and limiting the right in the other, as excluding the husband from all interest in the one having the absolute estate, is not sustained by the adjudicated cases.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

C. F. & A.R. Burnam for appellant.

Parrish & Crooke for appellees.

CLAY'S ADM'R v. EDWARDS' TRUSTEE.

(Filed December 7, 1886.)

1. Release of trustee—Parties to action—Conceding that a trustee has the right to file a petition in equity for the purpose of being released as trustee and having a new trustee appointed in his stead, the court has no jurisdiction to hear his application unless he brings all the beneficiaries of the trust before the court by process, and sets forth in his petition the reason why he wishes to be released.

2. Void judgment releasing trustee—A judgment releasing a trustee and appointing another in his stead being void, he continued, notwithstanding the judgment, to be the legal trustee of the estate, and responsible for its faithful administration by the person appointed in his stead, in whose hands it was placed with his consent and by his procurement, and he and the person named as his successor are jointly and severally liable to the beneficiaries of the estate, regardless of the bond executed by the person named as his successor, upon which he became surety.

3. Final order—Redocketing—A judgment releasing a trustee and appointing another in his stead, and accepting a bond from the new trustee, in an action brought for that purpose, was final, and after the close of the term the court was deprived of all further jurisdiction of the action, and subsequent orders redocketing the case for the purpose of having the master to settle the accounts of the new trustee, and for the purpose of releasing his surety, were void.

4. Bond of trustee—While a bond executed by one as trustee under a void appointment is not good as a statutory bond, it may be enforced as a common law bond against both the principal and his surety, the former having received the trust estate and failed to account for it.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Bennett.

On the 2d day of March, 1866, Ossian Edwards, of Bourbon county, Kentucky, deeded to J. N. Fry all of his personal estate, consisting of the proceeds of a tract of land amounting to \$28,909.15, and household and kitchen furniture, and choses in action of every description, to be held in trust by J. N. Fry

for the exclusive use and benefit of Patsy K. Edwards, wife of Ossian Edwards, as separate estate during her life, with remainder to such of her children by Ossian Edwards as might be living at her death, and to the living descendants of such as might have died before her death, with power in said trustee to invest said estate, by the consent of Patsy K. Edwards in writing, in any real or personal estate for said trust purposes. Also to sell, reinvest and resell and reinvest said estate from time to time as the interest of said wife and children, in his and her judgment, might require.

J. N. Fry accepted said trust and proceeded to administer it until the 19th day of April, 1867. On that day there was a paper filed in the Bourbon Circuit Court styled as follows:

“Bourbon Circuit Court.

“Patsy Edwards' Trustee on petition.”

Then follows what purports to be the statement of J. N. Fry, trustee for Patsy Edwards, and Patsy Edwards herself, setting forth the conveyance of said estate to J. N. Fry in trust “for the separate use of said Patsy for life, with remainder to his, Ossian Edwards', children by her,” etc., and that said Fry had accepted said trust, and that it had become inconvenient for him to act, and he asked to be released as trustee, and that some one be substituted in his stead. Then follows the statement of Patsy Edwards, expressing her willingness to the release of Fry as trustee, and asking the appointment of S. H. Clay in his stead.

This paper was not sworn to nor signed by any one.

On the same day that said paper or petition was filed an order was made displacing said Fry as trustee, and appointing S. H. Clay trustee in his place, and “the parties hence dismissed.” And on the same day S. H. Clay executed bond as trustee, with J. N. Fry as his surety.

At the October term, 1868, of the Bourbon Circuit Court an order was made redocketing the case, and discharging J. N. Fry from any liability as surety for S. H. Clay on said bond, and directing that said Clay do execute another bond as trus-

tee with W. H. Pierce as surety, payable to Patsy Edwards; and thereupon Clay executed another bond with W. H. Pierce as surety, and the papers were ordered filed away. On whose motion the case was redocketed and the orders taken does not appear.

At the April term, 1872, of said court it was entered upon the record that "by consent of parties it is ordered that this action be redocketed, and is referred to the master, who is directed to audit," etc.

On the next day the master filed a long report showing that there had come to the hands of S. H. Clay as trustee, including interest, over \$20,000, all of which he had expended, and more, too, by over \$2,500. The report of the master was confirmed in haste, and the papers again filed away.

It does not appear at whose instance said order redocketing the case was made or the orders taken. The order simply recites "by consent of parties."

S. H. Clay died in 1873, and H. C. Clay was appointed his administrator.

H. T. Paton, who had been appointed trustee in place of S. H. Clay, and Patsy K. Edwards and her children brought suit against H. C. Clay, as the administrator of S. H. Clay, and J. N. Fry, as surety on the bond of S. H. Clay.

They, H. T. Paton, &c., set out in their petition and amended petition the deed of trust of Ossian Edwards to J. N. Fry; that Fry accepted the trust, and received the trust estate, amounting to over \$28,000; that Fry afterwards turned over to S. H. Clay the amount of the trust estate remaining in his hands, who had been appointed trustee in place of Fry by the Bourbon Circuit Court, and who had executed bond as such trustee with Fry as his surety; and the report of the master showed that there had come to the hands of S. H. Clay, including interest thereon, over \$20,000, and in violation of his duties as trustee, and in violation of the rights of the

plaintiffs, he had paid out to numerous persons not entitled thereto large parts of said estate.

The administrator and Fry filed separate answers. The answers traverse the charge of improper use of the trust estate, and that it had been paid out to persons not entitled to it.

They also pleaded the settlement of S. H. Clay's accounts made in 1872 by the master commissioner of the Bourbon Circuit Court, and its approval by the court in bar of the action.

Fry also pleaded his release as surety on S. H. Clay's bond by the Bourbon Circuit Court in bar of the action as to him.

The plaintiffs in their reply attacked the proceedings of the Bourbon Circuit Court, by which Fry was released as surety on S. H. Clay's bond as trustee, and by which the settlement was made, upon the ground that they were void.

The court below not only adjudged that these proceedings were void, but adjudged that the judgment of the court releasing Fry as trustee and appointing S. H. Clay trustee in his stead was void also. The lower court then referred the case to the master commissioner for the purpose of auditing.

The master reported the balance due plaintiffs, after deducting all proper credits, which, together with interest thereon, amounted to \$13,880.

The lower court rendered judgment for this sum against H. C. Clay, as administrator of S. H. Clay, and J. N. Fry. From that judgment they have appealed to this court.

The paper filed on the 19th of April, 1867, with the caption "Patsy Edwards' trustee on petition," as a pleading is certainly a nondescript. It does not come up to any of the requirements of the Code of Practice, which was in force at that time. Besides, the paper brought none of the beneficiaries of the trust before the court, nor did it profess to do so, except Patsy Edwards; and as the paper was signed by no one, nor sworn to by any one, it can not be said that she was before the court.

Conceding that Fry had the right to file a petition in equity in the circuit court for the purpose of being released as trustee,

and the appointment of a new trustee in his place, he could do so only by filing his petition and making all of the beneficiaries of the trust estate parties, and bringing them before the court by process, etc., and setting forth in his petition the reason why he wished to be released, and the appointment of a new trustee. (Hill on Trustees, page 280.) None of these things occurring, the lower court had no jurisdiction to hear and determine Fry's application for a release, and the appointment of a new trustee. Therefore, its judgment releasing him as trustee and appointing S. H. Clay in his stead was void. It follows that all of the subsequent proceedings of the court, taken at the October term, 1868, reinstating said case on the docket, and releasing Fry as the surety of S. H. Clay on his bond as trustee, and the taking of a new bond from Clay with W. H. Pierce as surety; and at the April term, 1872, again reinstating said case on the docket, and ordering the master to settle and audit the accounts of S. H. Clay as trustee, and the judgment approving and confirming the master's report of settlement, were void.

The judgment of the circuit court rendered on the 19th of April, 1867, releasing Fry as trustee and appointing Clay in his place being void, and nothing occurring in the subsequent proceedings of the court validating said void judgment, it follows that Fry, notwithstanding said judgment, continued to be the legal trustee of said estate. And as the same was placed in the hands of S. H. Clay with the consent of Fry and by his procurement, he is responsible as such trustee to the beneficiaries of the trust for Clay's faithful administration of it according to the terms of the trust deed and for his payment of it to the proper parties.

But conceding, for the sake of the argument, that the judgment rendered on the 19th of April, 1867, releasing Fry as trustee and appointing Clay in his stead, and taking Clay's bond as trustee with Fry as his surety, was valid, yet it must also be conceded that the judgment was final, and that the dismissal of the parties to the action deprived the court, after

the closing of its term, of all further jurisdiction of the action or its subject-matter; and that jurisdiction could thereafter not be regained for any purpose whatever, except by a regular petition bringing all of the parties interested before the court, and setting forth the grounds for the relief desired, because the judgment was not only final, but was executed at that term of court, and nothing, by the terms of the judgment, was directed to be done thereafter, and which remained unfinished. Therefore, the subsequent orders redocketing said case, the first for the purpose of releasing Fry as the surety of Clay, the second for the purpose of having the master to settle the accounts of Clay, were void and of no force.

According to the foregoing views the bond executed by Clay, with Fry as his surety, is void as a statutory bond, but it is not void as a common law bond.

This court, in the case of *Cotton's Guardian v. Wolf*, 14 Bush, 246, says: "The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily and for a valid consideration, and if not repugnant to the letter or policy of the law.

"Cotton, on his own motion, was permitted to qualify as guardian, and by the execution of the bonds obtained the possession of the estate belonging to each one of the infants, and after converting it to his own use, his surety, the party who enabled him to reduce it to possession by going on the bond, is now insisting that he is not responsible, because the entire proceeding under which the appointment was made is void. * * * One who voluntarily qualifies as guardian, whether in good faith or as a mere wrongdoer, and by the execution of a bond obtains the possession of the ward's estate, will be held liable, together with his surety, for it, although the appointment may be void."

The appellees sued on the bond executed by S. H. Clay with Fry as his surety. They set out in their petition and amended petition in substance that S. H. Clay had not faithfully executed the trust which he had assumed; that he had violated

said trust duties by paying out a large part of the trust estate to persons not entitled to it, etc. It is true that the petition not only sets forth the bond, but the subsequent proceedings of the court above alluded to, including the settlement by S. H. Clay with the master, and attempts to surcharge that settlement. But none of these allegations were necessary to constitute a cause of action. All of them should be regarded as surplusage. The lower court doubtless did so. Then regarding them as surplusage, and as stricken out of the petition and amended petition, the allegations left therein are sufficient to sustain an action on the bond as a common law bond.

The bond and its execution by Clay, with Fry as his surety, the breach of the bond, and the relief demanded are sufficiently set out.

The foregoing views dispense with the necessity of discussing the questions raised as to the sufficiency of the pleadings, and as to whether the appellees' reply is a departure from the cause of action set up in their petition and amended petition.

These questions are made upon the idea that the bond is good as a statutory bond, and that the subsequent proceedings of the court are valid.

Clay and Fry are not only bound upon this bond as a common law bond, and appellees' action may, therefore, be treated as well taken, but they could have been held bound without reference to the bond, because the attempted release of Fry as trustee, and the appointment of Clay in his place being void, Fry in fact continued to be the legal trustee; and Clay having acquired the possession and control of the estate as a wrongdoer by the consent of Fry, they are both jointly and severally liable to appellees for any mismanagement of it by Clay.

We find no error in the master's report.

The judgment of the lower court is affirmed.

J. Q. Ward, B. F. Buckner and Geo. C. Lockhart for appellant.

J. W. Lucas for appellees.

HOWE & BARNES, &c. v. STEVENSON & WILLIAMS, &c.

(Filed December 9, 1886.)

1. Transfer from one court to another—Submission to jurisdiction—Assignees for the benefit of creditors instituted suit in the Clark Court of Common Pleas for a settlement of the estate of the assignors, and a distribution of the proceeds among creditors. That court granted an injunction restraining the creditors from proceeding by any other action to enforce their demands. Certain creditors who were made defendants to that action afterwards instituted an action in the Montgomery Circuit Court against the assignees and another to have a transfer of property by the assignors to the latter, made before the assignment, declared to operate as an assignment, etc. The Clark Court of Common Pleas ordered this action to be transferred from the Montgomery court and consolidated with the action brought by the assignees, which was done. Before answers were filed the plaintiffs in the action brought from the Montgomery court moved to remand the case to that court, which was overruled. The plaintiffs in that action then moved the court to take their petition for confessed because no answer had been filed. Held—That the court should have remanded the case to the Montgomery court, the case not having been brought to the Clark court in the proper way, but the Clark court having jurisdiction of the subject, the plaintiffs by moving for judgment waived their right to thereafter object to the jurisdiction of the court.

2. The proper practice was for the assignees to have appeared in the Montgomery court and filed their answer, disclosing the pendency of the action in the Clark court, and that an injunction had been granted, whereupon it would have been the duty of the Montgomery court to suspend proceedings.

3. It is a condition precedent to the power of one court to order the transfer of cases from another under the provisions of section 210 of the Civil Code that attachments shall have been levied.

Appeal from Clark Court of Common Pleas.

Opinion of the court by Judge Bennett.

The appellees, Stevenson & Williams, on the 18th of December, 1882, sold to the appellee, Bush, real and personal estate, for the price of which he executed to Williams & Stevenson four notes.

Shortly after this transaction Williams & Stevenson made an assignment of their property to the appellees, Beckner & Winn, for the equal benefit of all their creditors. Among the assets assigned and delivered for said purpose were the four notes on the appellee, Bush.

Soon after the assignment for the benefit of creditors by Williams & Stevenson the assignees brought suit in the Clark Common Pleas Court for the purpose of having a settlement of said estate, and a distribution of the proceeds among the creditors of the assignors. The appellants, as creditors of the assignors, were all made defendants to said suit. Some of them were served with summons. The Clark Common Pleas Court granted an injunction restraining the creditors of the assignors from proceeding by any other action to enforce their demands.

After this order had been made the appellants brought a joint action in the Montgomery Circuit Court against Williams & Stevenson and their assignees and V. W. Bush, in which they allege that the sale to Bush of said property was made with the design to prefer him as creditor, or partner, or surety, to the exclusion of Williams & Stevenson's other creditors, and in contemplation of insolvency, of all of which they allege Bush had notice. It is also alleged that the assignment to Beckner & Winn was intended to secure Bush in his said purchase, and that the assignees refused to assert claim to the property sold Bush by the assignors; and that they had colluded with the grantors for the fraudulent purpose of hindering and delaying their creditors. They asked to have the sale by Williams & Stevenson to Bush treated as an assignment for the benefit of all their creditors.

It appears from the record that the Clark Common Pleas Court, in the case of Beckner & Winn, assignees of Williams & Stevenson, ordered the case of appellants against appellees transferred from the Montgomery Circuit Court to the Clark Common Pleas Court, to be consolidated with the case of said assignees, which was done. After said transfer appellee Bush filed his separate answer to appellant's petition. In his answer he admits the sale of said property to him, and the subsequent assignment by Williams & Stevenson for the equal benefit of their creditors, but denies specifically and fully all of appellant's allegations in reference to the purpose and intention with which said sale was made, and in reference to the

purpose and intention with which said assignment was made. Beckner and Flanagan, the latter having been substituted as assignee, filed separate answers. The latter denied all of the allegations in reference to the intention with which the assignment was made. The answer of Bush also set up affirmative matter, which was material. The appellants did not reply to the answer of Bush. The case was submitted to the court for hearing without proof, and the court dismissed appellant's petition. They have appealed to this court.

The court, if it had jurisdiction, did right in dismissing the petition, first, because all of the allegations of the petition in reference to the purpose and intention with which the sale was made being denied, and the burden of proof being on the appellants to establish the truth of said allegations, there was a failure of proof; second, all of the allegations of the petition in reference to the intention with which the assignment was made being denied, there was a failure of proof as to that matter.

Previous to the filing of the answers the appellants moved the Clark Common Pleas Court to remand the case to the Montgomery Circuit Court upon the ground that the Clark Common Pleas Court had no jurisdiction of the case. The motion was overruled. Subsequently the appellants moved the said court to take their petition for confessed because there was no answer filed. This motion was overruled and the appellees were allowed to file answers.

The question is, had the Clark Court of Common Pleas the right to have the appellant's case transferred from the Montgomery Circuit Court to the Clark Court of Common Pleas to be consolidated with the case of Williams & Stevenson's assignees pending in the latter court? If not, then the motion of appellants to have the papers of said case remanded to the Montgomery Circuit Court should have prevailed, and for the error of the Common Pleas Court in overruling the motion the case will have to be reversed unless the appellants waived their right to take advantage of the error by subsequently moving

the court for a submission of the case, and for judgment by default.

Section 210 of the Civil Code of Practice provides: "If attachments levied on the same property, in whole or in part, be pending in different courts—if the courts be of equal jurisdiction—either of them, or during vacation the judge thereof, may order the removal of so many of said attachments, and of the actions in which they may have been issued, as may be necessary to have all of them in one of said courts."

The third subsection provides that such order may be made upon motion of any party to either of said actions after reasonable notice to all other parties to said actions or to their attorneys.

The record before us fails to show that an attachment was issued or levied in the case brought by appellants against the appellees in the Montgomery Circuit Court. Indeed the affidavit of one of the appellants shows that no attachment was issued, and nothing appearing to the contrary, we are bound to conclude that there was no attachment issued or levied.

Under the provision of the Code *supra* it is a condition precedent to the power of one court to order the transfer of cases from another court under the circumstances therein provided for that an attachment should have been levied. That not having been done in the case of appellants pending in the Montgomery Circuit Court, the action of the Clark Court of Common Pleas in ordering the transfer was wrong, and the motion of the appellants to have said order set aside and the case remanded to the Montgomery Circuit Court should have prevailed.

The proper practice in such a case was for the assignees of Williams & Stevenson to have appeared in the Montgomery Circuit Court, and have filed their answer to appellants' petition, disclosing the fact to the court that their suit was pending in the Clark Court of Common Pleas for the purpose of settling the estate of Williams & Stevenson as an insolvent estate, and for distributing the proceeds equally among their creditors;

and that appellants were party defendants to said action; and that the creditors of said Williams & Stevenson had, by the order of said court, been enjoined from proceeding by any other action to enforce their demands. Thereupon it would have been the duty of the Montgomery Circuit Court to suspend proceedings in said case until the rights of the parties could be determined in the action pending in the Clark Court of Common Pleas.

Now there is no doubt that the appellants could have raised the same question, and set up the same state of facts, and demanded the same relief in the case pending in the Clark Court of Common Pleas, wherein they were defendants, that they sought by their action in the Montgomery Circuit Court. The Clark Common Pleas Court had jurisdiction of the subject-matter of the action and of the parties as full and as complete as did the Montgomery Circuit Court, had the appellants chosen to avail themselves of that forum.

The only thing that deprived the Clark Common Pleas Court of its jurisdiction was the fact that by the voluntary act of the appellants the Montgomery Circuit Court acquired jurisdiction. After this jurisdiction was acquired the Common Pleas Court attempted to obtain jurisdiction of the case in the manner above mentioned. The appellants appeared before that court and objected. This they had a right to do, and the court should have heeded their objection, and remanded the case to the Montgomery Circuit Court. But it did not, and the appellants properly excepted, and that exception would be available here if the appellants had proceeded no further. They were the actors; by standing still and letting the court take such action, after overruling their motion as it pleased, they would not have waived their right to insist here that the court had no jurisdiction, in consequence of another court having acquired jurisdiction, which they preferred not to surrender. After the court had refused to remand the case they then asked for a confession and judgment. This was refused because the appellees said they wished to answer. But for

this they would have obtained a confession and judgment for the full relief asked. Can it be doubted that the judgment would have been valid? Why? Because primarily the court had jurisdiction of the subject-matter of the action of the parties, which it was deprived of exercising in the particular case by the voluntary act of the appellants, and by their voluntary act they could waive their right to the jurisdiction of another forum in which they had sought redress, and give it to the court in which they then were, brought there, it is true, against their will, and by a technical violation of their jurisdictional rights. This they did by asking for a submission of the case and for judgment upon the facts set up in the petition.

The judgment of the lower court is affirmed.

Judge Holt not sitting.

Henry L. Stone for appellants.

Wm. Lindsay and Rodney Haggard for appellees.

COMMONWEALTH v. WATTS.

(Filed December 7, 1886.)

1. Repeal of statutes—Codes and General Statutes—Neither the Civil nor Criminal Code repeals the General Statutes, nor any part thereof, except where the Code has provided “a mode of procedure,” by which the law upon a particular subject, as contained in the General Statutes, may be fully and effectually enforced.

Neither section 22 nor section 23 of article 1, chapter 47, General Statutes, providing for the issual of a search warrant for the detection of gaming tables, has been repealed by the Criminal Code.

2. Gaming tables—Who may issue search warrant—The provision authorizing a “judge or justice of the peace” to issue the search warrant, empowers the judge of the Louisville Law and Equity Court to issue the warrant, and the officer making the arrest in obedience to the warrant is authorized to bring the offender before the judge, to be dealt with as provided in section 23.

3. Search warrants—Statute providing for the issual of a search warrant need not recite conditions and restrictions of Constitution as to “seizures and searches.”

Appeal from the Jefferson Circuit Court.

Opinion of the court by Judge Lewis.

August 29, 1885, the judge of the Louisville Law and Equity Court issued a warrant directed to the proper officer, commanding him to enter and to search a house therein described for the detection of certain gaming tables and implements used for gambling, also described, and to seize and bring the same and likewise the bodies of appellees Wetzel and Jenkins before him, to be disposed of and dealt with according to law.

The sheriff to whom the warrant was delivered made a return thereon that he had executed it by arresting Wetzel, who gave bond for his appearance before said judge, but found no gambling implements of any kind described in the warrant.

Afterwards the following order was made:

"At a court held for the Louisville Law and Equity Court, the defendant, Wetzel, * * appeared at the bar of this court in pursuance to his recognizance, and the court being now advised, * * orders that the defendant Wetzel be held to appear before the next September term of the Jefferson Circuit Court, on the 7th day of September, 1885, upon said charge of setting up, keeping and exhibiting a keno bank and gaming tables, and that he be allowed to give bail in the sum of \$600 for his appearance in said court at said time, and to be of good behavior for the period of one year from this date." And thereupon Wetzel executed the bond mentioned and described in the order.

September 9 an indictment was found against him in the Jefferson Circuit Court for the offense of setting up, keeping and exhibiting a keno bank. And on the same day an order of that court was entered forfeiting the bail bond executed by him before the judge of the Louisville Law and Equity Court and for a summons to issue against him. But two days thereafter he entered his appearance and filed a response to the summons, in which he set up as a defense that the judge of the Louisville Law and Equity Court had no authority to issue the warrant for either a search to detect gaming tables or for his arrest, nor jurisdiction to either investigate the charge or

to hold him over, and that consequently the bond was void. And the circuit court having overruled the demurrer to the response and dismissed the proceeding on the forfeited bail bond, the Commonwealth prosecutes this appeal.

If the judge of the Louisville Law and Equity Court had the authority exercised by him in this case, it existed in virtue of sections 22 and 23, article 1, chapter 47, General Statutes, which are as follows:

“Section 22. A judge or justice of the peace may, by his warrant, cause any house or building to be searched, by night or by day, for the detection of gaming tables; and if admission be not given on demand made, the officer or other person in charge of the warrant shall force an entrance, seize the table and all other implements used therewith, and all money or other things staked or exhibited thereon, and arrest the keeper thereof.

“Section 23. Any setter-up or keeper of a gaming table may be required by a judge or justice of the peace to give security in \$600 for his appearance at the next circuit court of the county to answer the charge, and to be of good behavior for one year; and on failure, shall be committed to prison until after the next term of court, or until security is given; and if, after giving the security, he shall within one year keep or permit any such table to be used, it shall be deemed a breach of his recognizance.”

If the two sections quoted are valid and in force it is clear that the judge of the Louisville Law and Equity Court has authority to issue the warrant provided for in section 22. For the term “a judge,” which is the equivalent of “any judge,” comprehends an entire class, and can not, without distorting its meaning, be restricted in its application to judges of county, city and police courts, who, together with mayors, chairmen of trustees of towns and justices of the peace, are called in the Criminal Code “magistrates,” and alone empowered thereby to issue warrants of arrest.

To construe section 22 so as to withhold authority to issue
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the warrant therein provided for from the judge of the Louisville Law and Equity Court necessarily, and in defiance of the explicit language used, excludes as well judges of the circuit, criminal and common pleas courts.

Assuming, as we think must be done, that the judge in this case had, under section 22, authority to issue the warrant, it consistently and logically follows that the officer having appellee under arrest, in obedience to the warrant, was authorized to bring him before the judge to be dealt with as provided in section 23, which involved the legal necessity of an examination of the charge, for it would not be a reasonable supposition that the legislature intended to empower a judge to require a person arrested for setting up and keeping a gaming table to give security for his appearance at the circuit court and to be of good behavior for one year without a previous examination of the charge. But be that as it may, section 23 does in terms authorize a judge or justice of the peace to require and to take such bonds, and, in our opinion, the judge who issued the warrant and took the bonds in this case is not excepted from, but included by, the terms of the statute.

Section 11, article 13 of the Constitution does not prohibit, but impliedly recognizes, the general power of the legislature to enact laws authorizing "seizures and searches." it being, however, therein provided "that the people shall be secured in their persons, houses, papers and possessions from unreasonable seizures and searches, and that no warrant to search any place or to seize any person or thing shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation." And this power has been exercised by the legislature from the beginning, and decided by this court to clearly exist. (Reed v. Rice, 2 J. J. M., 46.)

But it was not necessary to the validity of section 22 for it to contain a recital of the conditions and restrictions of the Constitution just quoted, for, being enacted subject thereto, its enforcement of necessity must be in harmony therewith, whether so expressly provided in the statute itself or not.

In this case the warrant was in fact issued upon probable cause, supported by oath, and the place to be searched and the persons and things to be seized were described with reasonable certainty. And thus it was demonstrated that the statute can be properly and effectually enforced, and the requirements of the Constitution at the same time complied with. There could, it seems to us, be no better test of the validity of a statute.

The principal question in this case is whether sections 22 and 23, we are considering, have been repealed by the act adopting the present Criminal Code, passed subsequent to the General Statutes.

The first and third sections of that act are as follows:

“Section 1. That the provisions of this act shall regulate the proceedings in all prosecutions and penal actions in all the courts of this Commonwealth from and after the 1st day of January, 1877, and shall be known as the ‘Code of Practice in Criminal Cases.’

“Section 3. That all laws coming within the purview of this act shall become repealed when this act goes into effect, except as provided in the preceding (third) section.”

In *Broadus v. Broadus*, 10 Bush, 308, the question arose whether a provision of the Revised Statutes relating to the mode of trying and disposing of will cases had been repealed by the act adopting the General Statutes, and it was said:

“When a section in the Revised Statutes has been omitted in the General Statutes, or any change made, however slight, in the general law, the whole law, as found in the Revised Statutes on that subject, must be considered and treated as repugnant to the provisions of the General Statutes, as in construing one section of a general law the object and intention of the whole law must be considered. It never was contemplated by the revisors, or by the legislature, in adopting these statutes that both the old and new statutes should be considered together in determining what the law is.”

When it is considered that the Revised Statutes was intended

to be, and treated while in existence as, a complete system of laws, as a substitute for not any particular or given number of provisions, but the whole of which the General Statutes was adopted, it becomes apparent that the act establishing the new operated to abrogate the old system.

Upon the same principle, and according to the same rule of construction, the acts adopting the present Civil and Criminal Codes had the effect, in each case, to absolutely repeal the acts adopting the former.

But while the General Statutes is intended to be a system of general laws, distinct from the two Codes of Practice, the line of demarkation has not been rigidly preserved by the legislature, even if it was entirely practicable to do so. On the contrary, there are provisions in the General Statutes, the appropriate places of which are in one or the other Code, that have never been repealed, but have been in force since the adoption of the Revised Statutes, while there are provisions in the Civil, if not Criminal Code, which should be parts of the General Statutes.

It was, therefore, not intended that either the act adopting the Civil, or the one adopting the Criminal Code, should repeal the General Statutes as a whole, or any part thereof except such as, in the language of the repealing sections of both, comes within the purview of the acts respectively.

In *Payne v. Conner & Adams*, 8 Bibb, 180, this court defined "purview" as follows: "The meaning usually attached to this term by writers on law seems to be the enacting part of a statute in contradistinction to the preamble; and we think the provision of the act repealing all acts or parts of acts coming within its purview should be understood as repealing all acts in relation to all cases which are provided for by the repealing act; and that the provisions of no act are thereby repealed in relation to cases not provided for by it."

The rule there laid down has been since approved and applied in *Patterson v. Caldwell*, 1 Met., 487, and *Grigsby v. Barr*, 14 Bush, 330, in determining the effect of the repealing section of the former Civil Code on pre-existing general laws in relation to practice and procedure in civil cases, and it is equally ap-

plicable in construing the repealing section of the Criminal Code.

In the language of *Patterson v. Caldwell*, "the inquiry then arises, is a case like the present provided for in the Code?" Or, varying the question so as to comport with the language used in *Grigsby v. Barr*, has the Criminal Code provided "a mode of procedure" by which the law, as contained in sections 22 and 23, may be fully and effectually enforced?

Section 22 empowers a judge or justice of the peace, by warrant, to cause a search for the detection and the seizure of gaming tables and implements, and the arrest of the keeper at the same time and under the same warrant.

If nothing more than the arrest was contemplated by that section it would, technically, come within the purview of the Criminal Code, which provides fully for the arrest of persons charged with public offenses. But there is no authority, express or implied, given by the Code to any officer to cause, by warrant or otherwise, a search for and seizure of gaming tables and implements, nor does it provide any method of procedure by which such search and seizure may be made.

The object of the Criminal Code being to provide modes for preventing and prosecuting public offenses, should never be so construed as to defeat that object.

But if one part of section 22 be held as in force and the other repealed by the Criminal Code, it would result that the two things which the legislature evidently intended, and which the certain and complete execution of the law require to be done concurrently and under the same warrant, would have to be done, if at all, under the authority of different officers, by different process and at different times.

We are satisfied the legislature never intended that section 22 should be thus mutilated, and the efficiency of the statute thereby impaired.

So much of section 23 as authorizes a judge or justice of the peace to require any setter up or keeper of a gaming table to

give security for his appearance at the next circuit court of the county to answer the charge is within the purview of the Criminal Code, provision being made thereby for taking bail bonds.

But that section authorizes the judge or justice of the peace to require the person charged to further undertake, at the same time, to be of good behavior for one year; and it is therein provided that if, after giving the security, he shall within the year keep or permit any such table to be used, it shall be deemed a breach of his recognizance.

No authority whatever is given by the Criminal Code to any officer to require or to take a bond for good behavior in the meaning of section 23, nor, for the breach therein mentioned, to adjudge a forfeiture of such bond.

That section should, in our opinion, like section 22, be regarded as the legislature intended it to be, entirely unaffected by the repealing section of the Criminal Code. For the attempt to enforce it partly in the manner and by the officer therein provided, and partly under the Code, would involve the absurdity of two examinations and two bonds before two officers, each having but a fragment of authority, when the proper enforcement of the statute requires but one officer with full authority to issue the warrant, hold the examination, and take the bond required.

The offense of gaming is deemed of such importance as to be treated in the General Statutes under a separate title, and we are satisfied that the legislature did not intend that the provisions for the suppression of the vice which are exceptional and peculiarly stringent, yet consistent and dependent on each other, should be repealed, as a whole or in part, by the Criminal Code.

It appears that the bond in this case was taken in open court, instead of before the judge in person. But that fact does not impair the obligatory force of the bond.

In our opinion the demurrer to the response should have been sustained, and for the error of the court in overruling it

the judgment is reversed for further proceedings consistent with this opinion.

B. W. Duke and John B. Baskin for appellant.

SOUTHERN MUTUAL LIFE INS. CO. v. MONTAGUE.

(Filed January 6, 1887.)

1. Insurance—Pamphlet a part of contract—Where an insurance company, through its chief officers, issues a pamphlet making representations as to the plans upon which it insures, and sends this pamphlet out by its soliciting agents, it is to be regarded as part of a contract of insurance entered into upon the faith of the representations contained therein, and is to be considered in connection with the policy determining what the contract was.

In this case the insured is entitled to a paid-up policy, although his original policy did not provide therefor, as a pamphlet issued by the company and exhibited by the soliciting agent for the purpose of inducing the insured to take insurance represented that the company would issue such a policy.

2. Paid-up policy—Surrender of old policy—Where a policy of life insurance provides that after the payment of two full annual premiums the company will, in case of default, issue a paid-up policy in the event the old policy is surrendered within a certain time after default, the failure to surrender the old policy within the time provided will not forfeit the right to a paid-up policy, and in this respect there is no distinction between endowment policies and ordinary life policies.

In this case the time limited for the surrender of the old policy, which was an endowment policy, was thirty days.

Appeal from Taylor Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the month of December, in the year 1866, the Southern Mutual Life Insurance Co. issued its policy of insurance for \$2,000 on the life of R. S. Montague. The annual premium was \$70, and was paid from year to year until the year 1875, when a balance was left unpaid, for which Montague executed his note, due in eleven months from the 7th of December, 1875, with eight per cent. interest until paid.

On the 24th of October, 1871, the company issued another policy for \$2,000 on the life of Montague, the annual premium

being \$86.26, and payable to his wife. The first policy was No. 127 and the second policy No. 2,826.

The premiums on this last policy were paid from its date, and annually thereafter until October 24, 1884, when a note was given by the appellee to the company for \$72.96, due in nine months, and bearing 8 per cent. interest.

The two notes provided that in consideration of their execution the policies are continued until default of payment is made, when the policy shall cease and determine. When each of the notes for the premium unpaid on each policy was executed, there was a written extension of each policy for twelve months, with the proviso that if the notes were not paid at maturity "the said policy shall at once become void without notice to the assured." These notes were never paid, and the appellees claiming that, by the terms of the contract made between the appellee, Montague, and the general agent of the company, he was entitled to a paid-up policy to the extent of the premiums paid for the period covered by the original policies, demanded that the company should comply with its agreement, and the latter refusing, this petition in equity was filed, asking that the company be compelled to issue paid-up policies in accordance with their undertaking. The relief was granted, and the company has appealed.

It is contended by the appellant (the company) that nowhere in policy 127 is to be found any provision for a paid-up policy, but that, on the contrary, it is provided in the policy itself "that if the assured makes default in paying the annual premiums the company shall not be liable to pay the policy, or any part of it, but it shall cease and determine, and all payments made thereon and dividend credits accruing thereon shall be forfeited to the company," and that in the extension of time given for payment it was expressly provided that the policy should be void if the notes were not paid at maturity.

We find no provision in policy 127, or in the application made by the assured, by which he is entitled to a paid-up policy to the extent of premiums paid, but in policy 2,826 it is

provided "that after the payment of two full annual premiums, if the policy is surrendered within thirty days after default in payment of any subsequent premiums, the assured is entitled to a paid-up policy on the basis fixed by the agreement of insurance."

As the two policies contain different stipulations, we will consider first the right of the appellee to the relief sought as to policy 127.

It is maintained by the company that the import or meaning of this policy is plainly expressed in writing, and that its terms can not be varied or changed in any manner by parol testimony, and recognizing fully the importance of adhering to this principle in its application to written agreements, we will proceed to notice the pleadings in this case and the reasons assigned by the appellee for the relief he is seeking.

At the time the general agent of the company solicited the insurance from the appellee (policy 127) he presented and delivered to him a pamphlet issued by the company, with the names of its officers and executive committee endorsed upon it, setting forth the nature and advantage of life insurance, and particularly in the Southern Mutual Life Insurance Co., the pamphlet setting forth the benefit to be derived from a policy that would always be of value for surrender to the company when the assured was no longer able to pay.

This pamphlet reads: "Persons holding policies of insurance should never relinquish them without first communicating with the office, as policies have a money value. Those desiring to discontinue payments of the annual premiums may, after the payment of four annual premiums on the life plan or two on the ten-year or endowment plans, dispose of those policies to the company, in which case they will receive the equitable value, either in cash or a policy of insurance will be issued for a fixed sum, payable at death. During his life his policy will always be of value for surrender. All policies issued by this company for life participate in its surplus or profits, and the annual division of this surplus will be made in the most equi-

table manner among the policy holders, under the provisions of the charter of the company.”

It is further expressly stated as to ordinary life policies that “after four annual payments have been received by the company a paid-up policy for the amount of the cash premiums in excess of the actual cost of insurance for the period covered by the policy will be issued to the person insured on the basis of single payment in table No. 4, for term of life by limited payments, if the circumstances of the assured render such change necessary or desirable.”

This plan of insurance the company, through its chief officers, presented to the people of the State by its authorized agents, with insurance policies drafted in the manner and form as the one delivered to the appellee. It is not pretended that any part of this pamphlet was embodied in the insurance policy, but it is alleged by the appellee that it was represented by the agent of the company that the stipulations in said pamphlet formed part of the contract, and that after the payment of the premiums, four in number, the policy could not be forfeited to the extent of the payments made. The appellee paid nine premiums and failed to pay the tenth, and it is now claimed that he is not entitled to a paid-up policy because the verbiage of the pamphlet was not embodied in the policy. The exhibition of the pamphlet and the representations made by the company's agent, which are admitted by the appellant, and established by the testimony of that agent whose duty it was to solicit subscriptions upon the representations contained in the pamphlet, made that a part of the agreement. It was not the representations in fact of the agent, but the statements of the principal, made when the contract was entered into as an inducement for the appellee to take the insurance and pay the premium. It was not made a part of the policy that was to be signed by the company, because it had already been executed by its chief officers as containing the terms, or a part at least, upon which every insurance policy was issued, the terms varying to suit the mode of insurance adopted.

The printed pamphlet was not only the inducement, but formed a part of the consideration for which the premium notes were executed and the contract entered into by the assured. The rights of the assured under it was the prime cause for his accepting the policy, and gave the appellant as an insurance company, as it maintained, the preference over all others, and to hold that it was not intended as a part of the contract would be sustaining a fraud that no court of conscience could sanction.

The insured can not claim the policy valid to the extent of the original insurance because his failing to pay the premiums has forfeited that right, but having paid four full annual premiums he is entitled to a paid-up policy to the extent of the premiums paid, less the cost of insurance, as provided by the contract. It is insisted, however, that by the execution of the note for \$47, the default payment, a new contract was made by which he forfeited all rights under the contract. That was but a continuation of that contract for eleven months longer. If he had paid the note and kept his policy alive the right to the amount of the policy in those entitled at his death would have existed, but as he failed to do so the policy became void, except to the extent of the premiums paid.

It is urged that by the terms of the policy the appellee forfeits all right to the premiums paid where he is in default as to subsequent premiums, and that this writing, being inconsistent with the printed pamphlet, must prevail.

We think the two are easily reconciled, and are not led to believe that this company has issued the pamphlet in question with a view of deceiving the public, for by the one payment of four premiums makes the policy valuable to that extent, and by the other every payment previously made is forfeited when a default in payment occurs. The two construed as one mean only that a forfeiture occurs when the payments made are not sufficient to entitle the assured to a paid-up policy.

Any other construction works a forfeiture in all cases of default, where the company (and not the agent) has said to the assured that you shall not be deprived of your money without.

deriving any benefits after you have paid up as many as four full premiums. This construction was evidently placed upon the contract by the appellant, as the testimony clearly shows. When the policy for the \$2,000 had terminated by reason of the default in paying the note the assured wrote to the company, desiring to make payment and keep the policy alive. To this letter a response was made acceding to his wishes, but on the condition that he would waive his right to a paid-up policy. If no such right existed, why make such a demand? It is true the company asserted its right to forfeit all the money that had been paid, and was claiming that no such thing as a paid-up policy could be demanded by the appellee, but this was in direct conflict with the statements made to the assured, not by the agent, but by the company, when he was induced to accept the policy. It was this liberal provision that made insurance in such a company desirable, and afforded that protection to the assured to which he was in justice entitled, and no waiver of the right already vested in the appellee to demand a paid-up policy would have been insisted on but for the statement contained in the pamphlet, upon which the insurance in fact was accepted.

As to policy No. 2,826, this court, in the case of *Montgomery v. The Phoenix Insurance Co.*, 14 Bush, 51, decided the question involved. By the terms of policy 2,826 the company agreed that after two full annual premiums had been paid, if the policy was surrendered within thirty days after default as to subsequent payments, it would issue a paid-up policy for an amount proportionate to the number of years paid. This is termed in the pamphlet a nonforfeitable policy, but the policy itself forfeits the entire amount paid if not surrendered within thirty days after default made.

This court, in the case of *Montgomery v. The Phoenix Ins. Co.*, supra, declined to enforce such a forfeiture, and while a distinction is attempted to be drawn between endowment policies and ordinary life policies in determining the right of forfeiture, we are unable to perceive any. In the case cited the

surrender of the old policy was to be made within twelve months. It never was surrendered or the note paid, the assured dying two years after its execution. The same argument was made in that case as in this, that the failure to surrender the old policy was a noncompliance with the contract, and that the forfeiture should be enforced. This court said: "The premiums, by express convention, paid for both current insurance and a paid-up policy, and now to deny the assured the benefit of a paid-up policy because the old one was not surrendered in time is, in the strictest and most obnoxious sense, a forfeiture. Such a claim is without support in reason, justice or authority, and can not be sanctioned in a court of equity."

The case of the St. Louis M. L. Ins. Co. v. Grigsby, 10 Bush, 810, was but followed in the case against the Phoenix Insurance Co., and both sustain the right of recovery on policy 2,826.

We recognize the necessity for the prompt payment of premiums as they mature to enable insurance companies to comply with their contracts, and the right of the company to contract for a forfeiture upon the failure of the assured to pay; but here the company, by an agreement with the assured, has provided by its contract, that although the assured may be in default, if before the default occurs he has paid as many as four full annual premiums in the one case and two in the other, he shall be entitled to a paid-up policy. Such was the contract, and it should be enforced.

As to the basis adopted by the court below for ascertaining the amount of the paid-up policy to which the appellee was entitled by reason of the payment of premiums on both policies we are unable to say whether it was or not erroneous, as the manner of calculation is not before us.

The appellee was entitled to participate in the profits or dividends, and those profits or dividends were applied to the liquidation of the premium notes that had been executed.

The assured had made in cash payments at least \$500; he was a member of the company and entitled to a portion of the

dividends; was about forty-eight years of age when he had paid his four full premiums, and has been given by the judgment below a paid-up policy for \$797. To this he was entitled.

Judgment affirmed.

Rountree & Lisle, J. B. Temple and W. Lindsay for appellant.

A. Duvall and R. S. Montague for appellee.

COMMONWEALTH v. HAZELWOOD.

(Filed January 8, 1887.)

Dogs the subject of larceny—Under the law of this State a dog is property, and, therefore, the subject of larceny, the ancient common law rule having in effect been abrogated by statute in Kentucky, and this was true even prior to the act of the legislature of May 17, 1886.

Appeal from Woodford Circuit Court.

Opinion of the court by Judge Holt.

The only question presented by this appeal is whether, under the laws of this Statute, a dog can be the subject of larceny. Undoubtedly the rule was otherwise at common law. By it larceny could be committed of such domestic animals as cattle and sheep, and of domestic fowls, as hens and ducks, because they serve for food, and were, as Lord Hale says, "under propriety."

This was true also as to beasts or birds, *feræ naturæ*, when made tame, if they served for food, such as deer and pheasants, provided the thief knew them to have been reclaimed.

Larceny, however, could not be committed of some things, in which the owner even had a lawful property, and for an injury to which he could maintain trespass, as mastiffs and spaniels, by reason, as the common law writers said, of the baseness of their nature; nor of some animals, wild by nature, but rendered domestic, as foxes and bears, because they served for pleasure and not for food.

Blackstone says:

“As to those animals which do not serve for food, and which, therefore, the law holds to have no intrinsic value, as dogs of all sorts, and other creatures kept for whim and pleasure, though a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny.” (4 Bl. Com., 236.)

Coke, Hale and the other common law writers are to the same effect.

It seems difficult to give a sound reason for the old rule in view of the indisputable fact that many dogs are esteemed of great value, and justly so considered. It was adopted, however, when, following the Draconian law, grand larceny was punishable with death, and upon the ground, perhaps, that a dog could have no determinate value. This, however, in this day is not true; nor is it necessary to hold that a dog is of so base a nature that he can not be the subject of larceny in order to save the life of a man.

Property is clothed with value by the laws of society and public opinion. In a state of nature property does not exist. What one then retained and used depended upon his power. When, however, he enters into society, objects become property because they are impressed by its usages with certain qualities, among which is the right of the owner to their exclusive use and the power to dispose of them. If it be true that whether an object be property depends upon the usage or notion of society, then surely it has impressed upon the dog all the attributes of property. The master is entitled to the exclusive use and vested with an absolute power of disposition; while the present public estimate of this faithful and useful animal, coupled with the recognition of him as property in various ways by our statutory law, forbids the assumption that he can not be the subject of larceny because of a supposed base nature.

If it be the object of the criminal law to protect the citizen in that which is useful and valuable, as well as to punish one

who for *lucri causa* feloniously takes it from him, then we fail to see any sound reason why this animal, so varied in its species and so valuable and useful to man, should not be protected by the law.

It is domestic in its nature; it guards the property of its master; it serves as a companion; it assists the drover in the management of his stock; and renders itself useful by way of amusement, service and protection. We should be slow, however, to dissent from the ancient common law rule, so long established and so universally concurred in by common law writers in the absence of statutory abrogation of it. Our statute provides for the punishment of "persons guilty of the larceny of goods and chattels." (General Statutes, page 383.) The term "chattel" is a broad one. Bouvier in his Law Dictionary says that "a chattel is a term including all kinds of property except the freehold, and things which are parcel of it."

The question now arises whether our law so far recognizes a dog as property as to bring him within the meaning of this term. If so, then he may be the subject of larceny. By an act of our legislature of January 31, 1865, dogs were made liable to assessment and taxation; the tax arising therefrom not to be expended in paying for sheep killed by them or injuries done by them, but to become a part of the common school fund. (Myers' Supplement, page 189.)

The form of tax book given in the General Statutes provides for their assessment. (General Statutes, page 717.)

It seems to us that the imposition of a tax on them necessarily recognizes them as property; otherwise the law taxes them and yet fails to recognize the right of ownership.

In 2 Wharton's Criminal Law, section 1755, it is said that "as to all other animals which do not serve for food, such as dogs and ferrets, though tame and salable, or other creatures kept for whim and pleasure, stealing these does not amount to larceny at common law. It is otherwise, however, when they are taxed."

Our statute makes a man liable for damage done by his dog, thus recognizing that a dog has an owner, and that the thing

owned is property. It expressly speaks of "the owner," and provides how, under certain circumstances, he may be deprived of him.

For every civil purpose not only our statutes, but the decisions of our courts recognize a dog as property. The owner may sue in trespass for an injury to him, or bring replevin or trover for his conversion; and no stronger reasons exist for holding, as has been done, that canary birds, or tame pigeons, or bees, may be the subject of larceny, than those relating to dogs.

These views are supported by the cases of *The People v. Maloney*, 1 Parker's Crim. Rep., 598; *The State v. Brown*, 9 Baxter, 53; *The People v. Campbell*, 4 Parker's Crim. Rep., 386.

Before one can be convicted of stealing a dog the value must be shown. It can not well be urged that there is danger of persons being confined in the penitentiary for stealing "mongrel whelps of low degree," because, under our statute, before one could be so punished it must be proven that the stolen property was worth \$10 or over.

We have not reached the conclusion above indicated in forgetfulness of the act of the last legislature, approved May 17, 1886, providing that upon the listing of a dog with the county clerk, and the payment of the tax as therein provided, he should, for one year from that time, be considered personal property for all purposes as fully as any other kind of personal property; but, in our opinion, he was already personal property under the law of this State, and that the ancient common law rule had in effect been abrogated.

Judgment reversed, with directions to overrule the demurrer to the indictment and for further proceedings consistent with this opinion.

P. W. Hardin for appellant.

February, 1887—4

WHITESIDES, &c. v. CUSHENBERRY, &c.

(Filed December 5, 1879.)

1. Homestead—The husband has the right to sell his homestead regardless of the wife's wishes, and can pass to the purchaser a complete title, except the potential right of dower.

2. Case adjudged—At a sale of the debtor's land by an assignee for the benefit of creditors, the debtor announced that he relinquished his homestead, it being agreed that he was to have \$1,000 of the purchase money. He became the purchaser and received credit by \$1,000 on his notes for the purchase money. The property being again sold to satisfy the lien for the purchase money, he again claims a homestead. Held—That he is not entitled to a homestead, as he can not be allowed two homesteads in the same land.

Appeal from Simpson Circuit Court.

Opinion of the court by Chief Justice Pryor.

Upon a reconsideration of this case we must adjudge that the appellant, by his own action, has deprived himself of the right to a homestead. It is immaterial whether his wife consented to the sale or not; the husband had the right to sell regardless of his wife's wishes, and could pass to the purchaser a complete title except the potential right of dower. He bought this land at the sale by the assignee under the announcement that he would relinquish the homestead. The sale was made and confirmed and the value of the homestead credited on the purchase money, leaving something over \$8,000 due. When his notes for the purchase money are attempted to be enforced he again claims the homestead, and if allowed the homestead out of the land, or is credited by a \$1,000, its value, he reduces the amount owing by him to \$7,000, and thereby will have had two homesteads in the same land. He had the right to purchase the land, and when the sale was confirmed it could not well be avoided, or at least it must be regarded as a valid sale; and in the attempt to collect the purchase money he can assert no homestead claim. The judgment below was, therefore, proper, and should have been affirmed.

A. Duvall, G. W. Whitesides and J. M. Galloway for appellants.

R. Rodes, Bush & Goodnight and Wm. Lindsay for appellees.

PAYNE v. PAYNE, &c.

(Filed September 20, 1879.)

Arbitration and award—Appeal—No appeal lies from an award by arbitrators under a statutory reference, although by entry of record it is made the judgment of the court, unless some exception is taken affecting the validity of the award under the statute.

Appeal from Butler Circuit Court.

Opinion of the court by Chief Justice Pryor.

It appears from the record in this case that the questions at issue between the parties were submitted to the arbitrament of Payne and Clark, the two having been selected to adjust the differences between them, and their report or award to be made the judgment of the court. The power of the chancellor to determine the equitable rights of the parties has been taken from him, and a statutory reference agreed upon, and now this court is asked to reverse the judgment below for no other reason than that the weight of the evidence on many of the issues is with the plaintiff. The award, it is true, by the entry of record was to be made the judgment of the court, and so of every statutory award made between parties; and although an appeal is allowed in this case this court will not disturb a judgment that was not rendered by the chancellor. The right is reserved to the courts to set aside an award upon equitable principles as if no statute in regard to awards had been enacted. Fraud or palpable mistake as to the law or facts is the only ground for revising an award by the chancellor. Exceptions may be taken to an award made under the statute for the reason the statute has not been followed. No such exception can be sustained in this case as the parties have dispensed with many of the formalities by an entry of record, and if not, we perceive no objection to its validity. There is not a single issue presented in the case about which proof has been introduced that is not supported by testimony on each side, and in many instances so conflicting as to make the statements irre-

concilable. There is no fraud on the part of the arbitrators, and no palpable mistake of law or fact. Whether the \$15,000 note belonged to the plaintiff is involved in doubt, and as to the nature of defendant's title to the land no defect has been pointed out, except the existence of encumbrances that were known to the appellant when he made the purchase. Waiving, however, the discussion of the facts in the case, parties litigant have no power to divest the chancellor of his jurisdiction except in the manner provided by the statute, and a judgment or award made by arbitrators will not be regarded as a judgment rendered by the chancellor, so as to give this court that supervisory power over the case that it has where the chancellor alone acts.

The powers of courts of chancery over awards have not been increased or diminished by the statute, except in regard to certain formalities connected with the proceeding.

The award in this case was made pursuant to the submission. The parties were present when the hearing took place. The award is made the judgment of the court. An award is intended to be a final settlement of the controversy between the parties, and an agreement that it shall not be so regarded will not give this court the jurisdiction to reverse or affirm the judgment as in ordinary cases. If equitable grounds exist for setting the award aside the chancellor must be appealed to. The award being regular in this case, and no exception taken that can affect its validity under the statute, this court must dismiss the appeal. The same is, therefore, dismissed.

P. G. Stiver Perkins for appellant.

KENTUCKY SUPERIOR COURT.

DEATHERIDGE v. CRUMBAUGH.

BENNETT v. SAME.

(Filed January 7, 1887.)

1. Banks—Rights of check holders—The giving of a check by a depositor upon a fund or part of a fund to his credit in bank is an assignment and

appropriation of the amount named in the check to the payee or rightful holder thereof, and this appropriation can only be defeated by other appropriations made by the depositor and accepted by the bank without notice of the previous check. Therefore, the claim of a check holder is superior to that of a creditor attaching the fund before presentment of the check.

2. Pleading—Amendments—A party has the right to amend his pleading so as to present the issue which the evidence presents. If the proof sustains his amendment his motion to file it is necessarily made in good faith.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Ward.

In these consolidated cases the law and facts were submitted to the court. The facts as found by the court were that George W. Lewis was indebted to appellee, Mrs. Crumbaugh, in the sum of \$1,000; and on the 25th of January, 1885, he executed and delivered to her a check for \$550 on the First National Bank at Georgetown, which check she did not present to the bank for payment until February 4. In the meantime, to wit, January 27th, the appellant in each of these suits caused attachments to be issued and served upon the bank, thereby attaching in the hands of said bank the sum due by the bank to George W. Lewis, a depositor therein. The amount to the credit of Lewis, both on the 25th and 27th of January, was \$586.60.

Upon these facts the court adjudged that Mrs. Crumbaugh's claim, or equity, to the fund in bank, to the amount of her check, was superior to that of the attaching creditors, and the only question involved in this appeal is the correctness of this proposition as matter of law.

The fact that Mrs. Crumbaugh instituted suits upon the debts, for the payment of which in part the check was given, without giving credit for or referring to the check was a fact or circumstance, in connection with others, bearing upon the question as to whether the check was given before or after the 27th of January, but it was not conclusive evidence that the check was given after the 27th and dated back; nor did she, by the mere institution of her suit, waive or abandon the benefits which she secured by taking the check. The acceptance of the check did not amount to an absolute payment, nor to a

payment at all, until the check was honored or the amount thus appropriated was lost to Lewis by the laches of the payee of the check.

It is insisted by counsel for appellant that Mrs. Crumbaugh did not secure any rights to the fund in bank until she presented her check at the counter for payment, which could prevail over those secured by the levy of the attachment, and we have been referred to a number of cases which it is claimed so hold.

The mistake of counsel, as we think, consists in the assumption that the attaching creditors acquired a legal right to the fund in bank by the levy of the attachment. The cases cited sustain the right of the party to the fund due by the bank to a depositor who has first secured the acceptance of a check which was taken for value, and without notice of any previous assignment or appropriation. The bank by accepting the deposit becomes the debtor of the depositor, and agrees to pay the amount to his credit as he may, by checks drawn from time to time, direct, and the rights of conflicting claimants to the fund due by the bank to the depositor must of necessity rest upon the fact as to which has the first or better claim, just as it does in case of the ordinary assignment of any claim or chose in action, with perhaps this difference only, that the bank agrees to pay in sums as the depositor may order, and, therefore, a part of the fund on deposit may be assigned or appropriated; but a part of an ordinary debt or demand can not be assigned so as to vest a right of action in the assignee without the debtor's consent.

In *Lester & Co. v. Givens, Jones & Co.*, 8 Bush, 361, the right of a payee of a check to maintain an action thereon against the bank in the event the drawer of the check had at the time of the presentment sufficient funds to pay it, and the bank refused payment, after presentment of the check and demand, was expressly determined. That was the only question involved.

In *Taylor's Adm'r v. Taylor's Ass'ee, &c.*, 78 Ky., 470, the

facts were that Taylor, being insolvent, drew his check for \$114 in payment of an antecedent debt. It was held that:

“It was a clear case of preference within the statute unless the manner in which the preference was given takes it out of the statute. Within the common acceptation of the term it was an assignment of a chose in action. As said in *Williams v. Rogers*, 14 Bush, 788: ‘Whenever a deposit is made in bank the relation of debtor and creditor is established between the bank and the depositor. The identity of the particular money is lost and the relation between the parties continues the same, whether it is an ordinary or a time deposit.’ ”

In *Chambers v. Northern Bank of Kentucky*, 5 Ky. Law Rep., 124, the facts were that Casey, Chalfant & Co., on the 20th of April, 1878, having \$500 to their credit in the Northern Bank, drew their check for said sum on said bank in favor of Chambers. The check was not presented for payment until the 23d of April. On the 22d day of April the drawers of the check filed their petition in bankruptcy, and the bank had notice thereof before the check was presented. The bank also claimed that the drawers were insolvent when the check was drawn, and that the check was drawn in contemplation of insolvency and with the design to prefer the payee. In that case the Superior Court said:

“It has been said by some courts that the holder of a check drawn upon a deposit has no cause of action against the bank until the check has been accepted. But the contrary view may be considered as the doctrine in Kentucky. (*Lester & Co. v. Givens, Jones & Co.*, 8 Bush, 361.) The rights, duties and liabilities existing between the depositor, the bank and the check holder depend upon the well-known usages of trade more frequently than upon an express contract. It is seldom that there exists, even between the depositor and the bank, any other contract than that implied by such usage. Where either natural or artificial persons hold themselves out as bankers by merely accepting a deposit, without any express agree-

ment, the usages of trade imply a contract to pay, in the order of their presentment, the checks of the depositor drawn upon the fund so long as it remains unencumbered. The law considers that the parties assume their relations with a view to this custom, and will enforce it as a part of their contract. The obligation of the bank thus incurred enures to the benefit of the check holder. But the holder's right to the fund is not perfected by the mere delivery of the check to him; he must first demand payment of the bank. There are many things that may occur between the delivery of the check and the demand of payment that will justify the bank in refusing to honor it.' If the bank has notice of the drawer's death the check should not be paid; or the drawer may, in the meantime, direct the bank not to pay the check when presented, and if the bank acts on such instructions it will be fully protected; or the fund, in the meantime, may be drawn out on other checks of even a later date." It was held that the assignment in bankruptcy did not pass the fund in bank as against the holder of the check because "the assignee in bankruptcy takes the property of the bankrupt, subject to all the equities that can be urged against the bankrupt." (Story's Equity, section 1228; Bump on Bankruptcy, page 500; *Lozeas v. Porter*, 7 Reporter, 216.)

So, in this case, the presentment of the check to the bank for payment on February 4 perfected the appellee's right to the fund unless there had been, in the meantime, some encumbrance upon it which was superior and better than that of the appellee under her check of the 25th of January. The attaching creditors acquired no greater or better equity to the fund than the equity then held by Lewis, and of course it can not be held that, as between Lewis and appellee, he could have successfully maintained any claim to the fund so far as the same was necessary for the payment of appellee's check.

Whatever rule the courts of other States may have adopted, we think that the Court of Appeals of this State, and following it, the Superior Court has, in accordance with reason and the principles governing the relations between banks and de-

positors, determined the rule in this State to be that the giving of a check by a depositor upon a fund or part of a fund to his credit in the bank is an assignment and appropriation of the amount named in the check to the payee or rightful holder thereof, and this appropriation can only be defeated by other appropriations made by the depositor and accepted by the bank without notice of the previous check. The demand of payment is necessary, because the bank only agrees to pay at its counter on demand evidenced by check. The presentment is necessary to cut off the claims of others which may be presented between the giving of the check and its presentment, but when the check is presented and demand made the right of the holder relates back to the time when the check was drawn unless some claim has, in the meantime, been established which is superior to his. Whether such a claim has or not been established is not to be determined by the peculiar relation between the bank and a depositor alone, but by this relation in connection with the general principles touching the rights of rival claimants and conflicting equities. It being established that the relation which exists between the bank and depositor is that of debtor and creditor, with the implied agreement upon the part of the bank to pay the funds in its hands to the party manifesting the best right thereto, and in any proportion it may be directed by check to so pay; and it being well settled that the claim of an assignee to an ordinary debt, or chose in action, is superior to that of a subsequent attaching creditor, even though the party owing the debt may not have notice of the assignment until he has been summoned as a garnishee, we do not see how there can be room for serious doubt or question as to the superior claim of the check holder to a fund in bank over that acquired by an attaching creditor subsequent in date to the check.

We can not say that the court abused a sound discretion in allowing the amended petition setting up the fact that the assignment was made to secure the claim for \$200, as well as the rent money. This was a fact bearing upon the good faith of

the transactions between appellee and Lewis, and as the court has found that there was an indebtedness of \$1,000, and the check was drawn as a payment thereon, and as there is sufficient evidence to support the finding, we can not say it was error to allow the pleading to be amended. A party has the right to amend his pleading so as to present the issue which the evidence presents; whether he acts in good faith or not is the question the court determines upon the motion to file the amendment. If the proof sustains the amendment the motion was necessarily made in good faith.

The judgment is affirmed.

James E. Cantrill for appellant.

Owens & Finnell for appellee.

Note—See *Rosenbaum & Co. v. Lytle & Co.*, page 607.

COURT OF APPEALS ABSTRACTS.

JONES, &c. v. NATIONAL MUTUAL BENEFIT ASSOCIATION.

Filed January 6, 1887. Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt, affirming.

1. Benefit societies—Assessments—The secretary of a mutual benefit society who attended generally to its business declined to receive from a member his dues because certain charges were pending against him, and notified him that he need not tender any dues until notified that those charges had been acted upon. The secretary afterward notified him that action on the charges had been suspended and that if he desired to retain his membership he must pay his dues.

Held—That while the member had the right to rely upon the secretary's statement that he need not pay until notified, yet, when notified, it was his duty to pay, and failing to do so, he forfeited his membership.

2. Charges against members—Decision conclusive—When a by-law of a corporation provides for the investigation of a charge against a member, the officer trying the matter acts judicially, and his decision is, in the absence of fraud, conclusive, and can not be assailed collaterally.

The charter of appellee provides that if any member shall in his application have falsely stated that he was a temperate and sober man, then, upon notice and hearing, he may be dropped from membership. Such a charge was preferred against a member and an investigation had, but action was indefinitely suspended. Held—That while an absolute dismissal of the charge might have been conclusive against the company, it is not under the circumstances precluded from relying upon the alleged misrepresentations to avoid the payment of the insurance, the member having died before the charge was finally acted upon.

John W. McGee and J. P. Helm for appellants.

Bullitt & Harris and Helm Bruce for appellee.

TUCKER v. BENTLEY.

Filed January 8, 1887. Appeal from Letcher Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Vendor and vendee—Limitation—A vendee who asks that a deed be made him will not be allowed to refuse to pay the purchase money because of the lapse of time.

Tinsley & Marrs for appellant.

John D. White for appellee.

JOHNSON, &c. v. JOHNSON.

Filed January 8, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Holt, affirming.

1. Husband and wife—Conveyance to defraud wife—A conveyance by the husband, with intent to defraud the wife, can not defeat her right to alimony.

A husband abandoned his wife without cause, leaving her in possession of a small house and lot, which was all the property he owned. Soon thereafter he conveyed this property to his cousin, with whom he was living, from whom he then rented it, with the agreement that upon his failure to pay the rent for any month he was to surrender possession without demand or notice. Failing to pay the rent for the first month, his cousin, with whom he was still living, sued out a warrant of forcible detainer, and the wife was ignorant of all that had transpired until she was about to be evicted. She then instituted this action for a divorce a mensa et thora, and for alimony, attacking the conveyance by her husband as fraudulent. Held—That a judgment setting aside the conveyance and allowing the plaintiff the house and lot for life in lieu of alimony was proper.

2. A vendor can not, after the sale by him, disparage the title of the vendee by his declarations, therefore, in an action to set aside a conveyance as fraudulent, declarations by the vendor, to the effect that the conveyance was designed to defraud, are not competent evidence.

Kohn & Barker for appellants.

O'Neal, Jackson & Phelps for appellee.

CUMMINS v. CARRICK'S EX'ORS.

Filed January 8, 1887. Appeal from Bourbon Circuit Court. Opinion of the court by Judge Lewis, affirming.

Executors—Power to sell land—A testator, by his will, invested his executors with a discretionary power to sell land owned by him jointly with his brother, and reinvest the proceeds. The brother afterwards died, leaving a will directing his executors to unite with his brother's executors in the sale of the land owned jointly by them, provided his brother's executors should deem it best to sell. After the death of both brothers their vendor had the deed to them declared to operate as a mortgage, and at a sale of the land under decree to satisfy the mortgage debt the executors of the first-mentioned brother became the purchasers of the entire tract, which included not only the interest previously belonging to their testator, but also that of his brother, and the commissioner conveyed to them for the benefit of the devisees of their testator "as provided in his will." Held—That these proceedings did not have the effect to either lessen or restrict the power of the executors to sell and reinvest as directed in the will, and that their sale and conveyance of the land confers upon the purchaser as valid a title as he could have acquired by purchasing it himself at the judicial sale and receiving a deed direct from the commissioner.

George C. Lockhart for appellant.

Cunningham & Turney for appellees.

BYERSDORFER v. SCHULTZ.

Filed January 11, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Bennett, affirming.

Practice—Cost—In an action to recover land, the controversy growing out of a disputed boundary, the filing by the defendant, during the progress of the trial, of an amended answer disclaiming to own or be in possession of the land sued for, did not have the effect of defeating the plaintiff's right to a verdict and judgment so as to save his cost, it appearing that the defendant did claim to own and possess the land when the action was instituted.

L. T. Applegate for appellant.

John H. Barker for appellee.

JOHNSON v. SKAGGS, &c.

Filed January 11, 1887. Appeal from Green Circuit Court. Opinion of the court by Judge Bennett, affirming.

Fraudulent conveyances—It is only persons whose rights are prejudiced by a fraudulent conveyance that have a right to complain of it.

A subsequent creditor of the grantor can not, therefore, have the conveyance set aside unless the grantee holds the land in secret trust for the grantor; but this will be presumed where the conveyance was made by an arrangement between the grantor and grantee to defraud the grantor's creditors. No such secret trust, either express or implied, appearing in this case, the court refuses to set the conveyance aside at the instance of a subsequent creditor, although fraudulent on the part of the grantor.

D. Hudson and D. A. Caldwell for appellant.

D. T. Towle for appellees.

GREEN v. WILSON.

Filed January 13, 1887. Appeal from Grayson Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Ejectment—The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's.

2. Adverse possession—Conflict of boundary—Where two or more persons are holding adversely to each other with a conflict of boundary, and claiming title by possession alone, the one first entering will be presumed to hold to the extent of his boundary unless that occupancy has been abandoned, and the one who subsequently entered will be treated as holding only to the extent of his actual enclosure.

3. One who purchases the possession of a tenant will not be allowed to dispute the title of the landlord. It was, however, a question for the jury in this action of ejectment by the landlord against a person who had purchased the tenant's possession, whether, at the time the plaintiff's tenant entered the defendant had abandoned a previous occupancy, since, if he had not done so, the tenant's entry was wrongful, unless the plaintiff's boundary extended to, and embraced, the land in dispute.

4. Jurisdiction to sell nonresident's land—A court of equity can acquire

no jurisdiction to sell the land of a nonresident, except by the levy of an attachment unless a lien exists by reason of a contract, by statute, or in equity.

In this case it is held that a court of equity had no jurisdiction in a proceeding against the unknown heirs of a judgment defendant to enforce the judgment by a sale of the decedent's land, no attachment having been levied, no lien existing by contract, by statute or in equity, there being no return of "no property." The purchasers at such a sale, therefore, acquired no title. They may, however, in this action of ejectment against them, defend under the title of the judgment debtor. If the latter was in possession at the time of his death claiming under a perfect paper title, the claim of his heirs can not be defeated by the entry and claim of the plaintiff under a mere possessory title except to the extent of his actual enclosure for the statutory period.

Montgomery & Poston, G. W. Stone and Richards & Hines for appellant.
James S. Wortham for appellee.

LEE, &c. v. PAGE & CO., &c.

Filed January 13, 1887. Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt, reversing.

1. Insurance—Interest of married woman—A policy of life insurance being payable to the personal representative or assignee of the assured, and assigned by him to his wife, upon her death her interest passed to her children and no part of it to her husband, the statute providing that a policy of life insurance made payable or assigned to a married woman shall inure to her separate use and benefit and that of her children, independently of her husband.

2. Release—Consideration—The children having released to their father their interest under the policy, reciting that the release was "for value," they can not claim, as against one to whom their father has assigned the policy in good faith to secure an existing indebtedness, that their release was without consideration.

3. Married women—Such a release executed by a married woman, without her husband joining her, does not pass her interest.

E. E. McKay for appellants. •

BOYD v. JONES, &c.

Filed January 13, 1887. Appeal from Nicholas Chancery Court. Opinion of the court by Judge Lewis, reversing.

1. A stepfather having hired out his stepchildren and received their earnings, the children, in an action against him by their next friend, are entitled to recover the amounts of their respective earnings received by him. He having assumed to act as their guardian, should be held accountable for the money as if he had been a regularly appointed guardian; and land in which the money thus received was invested may be subjected to the claim of the plaintiffs.

2. Liens—Joinder of plaintiffs—Under Myers' Code, as under the present Code, two or more persons having liens on the same property could unite as

plaintiffs for the enforcement of their respective liens, instead of bringing a multiplicity of suits.

3. The administrator, and not the heir, must sue for a debt due the decedent, and the enforcement of a lien by which it is secured.

The judgment in this case is reversed solely on account of the error in allowing the plaintiffs to recover the amount due their deceased sister.

J. M. Nesbitt for appellant.

Thomas Kennedy for appellees.

LINDSAY, &c. v. SAYRE.

Filed January 15, 1887. Appeal from Gallatin Circuit Court. Opinion of the court by Judge Holt, affirming.

Homestead—*Res adjudicata*—While there can be no release or waiver of the homestead exemption as to creditors save by grant, in which the wife must unite, yet the homestead belongs to the husband, and when he, in a legal mode, puts in issue his right to it, the result is conclusive of the question, and he can not relitigate it because his wife was not a party to the former proceeding.

G. C. Drane and R. B. Brown for appellants.

L. L. Tiller and Wm. Cromwell for appellee.

SHEPPARD v. STEPHENS, &c.

Filed January 15, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Bennett, reversing.

1. Misjoinder of actions—Appellant alleges in a petition filed by him that he is the owner of a certain tract of land; that prior to his confinement in the penitentiary for a term of years he had sold to M. fifty acres of land which formed a part of the same tract, and that M. executed to him notes for the purchase money. He alleges that upon his return, after his absence, his title papers and notes were missing; that W. was in possession claiming under a deed from S.; that M. claimed that he had paid S. the money on the notes belonging to appellant, and had the deed of S. for the land. He charges in substance that the several parties named, who were made defendants, fraudulently combined to cheat him out of his land by getting possession of his title papers and notes, and then disposing of his land. He prays that the defendants be compelled to restore to him his title papers and notes; that the conveyances be set aside; that his title to the land be perfected and quieted, and that he have judgment against M., and that his lien on the fifty acres of land be enforced.

Held—That the alleged conduct of each of the defendants is so connected and interwoven with the alleged effort to deprive the plaintiff of his land and notes that there is no misjoinder of actions.

2. Refusal of plaintiff to elect—Where the plaintiff refuses to elect which of several causes of action he will prosecute the court should not dismiss the action, but strike out the cause improperly joined.

C. W. Lester for appellant.

Smith & Perkins for appellees.

ROBBINS v. LEBUS.

Filed January 15, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Contract to issue executions at same time—Appellant and appellee each having a judgment against the same defendant, appellant claims that it was agreed between them that their executions should be placed in the hands of the officer at the same time, and now complains that appellee violated that agreement, and asks for a resale of the debtor's land to satisfy both executions. Appellant was surety for the debt upon which appellee obtained judgment, and that debt was not satisfied by the sale of the debtor's land. Held—That the agreement is not proved. But even if it were, as it was appellant's duty to pay the debt for which the debtor's land was sold, the sale was for appellant's benefit, and he can not complain. Moreover, there was nothing preventing him from purchasing the land and thereby making it bring its full value. Equity will not relieve him until he has first done equity by paying the debt for which he is bound.

L. T. Applegate for appellant.

Martin & Ratcliffe for appellee.

COYLE, &c. v. KENTUCKY GRANGERS' MUTUAL BENEFIT SOCIETY.

Filed January 15, 1887. Appeal from Madison Circuit Court. Opinion of the court by Judge Bennett, reversing.

1. Benefit societies—Assessments—The appellee has no right to make an assessment upon surviving members to pay the benefit due the representatives of a deceased member until it has received proof of the death of such deceased member, and if it makes the assessment before such proof has been received a member failing to pay the assessment is not in default.

2. Notice of death—Appellee's secretary must, after proof of the death of a member has been received, give notice to the surviving members of the society, through its local agents, of the death of such member, giving his name, and at the end of ten days after the issuance of such notice the local agents must notify the members, who may not have voluntarily paid in the meantime, of the death of such member, giving his name. Upon the receipt of this notice the members for the first time become legally bound to pay the assessments against them, and this legal obligation may be discharged at any time within forty days from the date of the issuance of the secretary's notice.

3. Presumptions—The officers of the society, in making assessments and giving notice thereof, act in a ministerial and not a judicial capacity, and, therefore, no presumption arises in favor of the regularity or validity of their acts in these particulars. The facts must, therefore, not only be alleged when relied on, but proved.

4. Facts and not conclusions must be pleaded—An allegation that a member refused to pay an assessment in ten days after "legal notice" of the death of a certain other member is the averment of a conclusion and not of facts, and is, therefore, not a sufficient allegation of notice. Nor is this defect in the answer cured by copying into the answer a letter purporting to notify

the member that he was no longer a member of the society by reason of his failure to pay his dues for forty days, as it does not establish the fact that the preceding notices required by the by-laws had been given.

C. F. & A. R. Burnam for appellants.

J. E. Cantrill and John Bennett for appellee.

FINLEY v. FINLEY.

Filed January 15, 1887. Appeal from Ohio Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Divorce—The chancellor properly refused the husband a divorce, it appearing that he, by his unkindness and cruel treatment, was instrumental in producing the causes leading to the separation, the lewd conduct of the wife, which appears to have been the result of the opium habit, being the ground relied upon for a divorce.

2. Custody of child—The father and not the mother is entitled to the custody of their child, it appearing that the father, although formerly dissipated, has reformed, and that the mother, by reason of the opium habit, is not a fit person to raise and educate her daughter, now only five years of age. But the judgment giving to the father the custody of the child should not be of such a permanent character as to take from the chancellor the right to hereafter restore to the mother the custody of the child if she should become fit to have its custody, and the chancellor should require of the father bond with security, payable to the commissioner, conditioned that he will provide for the child and comply with the orders of the court hereafter made in the case. An order should also be made permitting the mother to see her daughter at stated intervals.

E. D. Guffy for appellant.

Hill & McHenry for appellee.

KRAMBEIL v. COMMONWEALTH.

Filed January 18, 1887. Appeal from Laurel Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

Detaining woman against her will—To authorize a conviction under the statute which imposes a penalty for the detention of a woman against her will for the purpose of having carnal knowledge of her, it must be alleged and proved that the taking or detention of the woman was against her will.

It is not sufficient that the attempt to have carnal knowledge of her was against her will.

W. L. Brown for appellant.

P. W. Hardin for appellee.

WORKMAN, &c. v. HAROLD.

Filed January 20, 1887. Appeal from Lawrence Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Legitimacy—Void marriage—A marriage was contracted in 1836, which was void by reason of the fact that the husband had a former wife living. Held—That the issue of the marriage was legitimate, the act of 1796, which provided that "the issue in marriage deemed null in law shall nevertheless be legitimate," being then in force.

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2. Deed of infant married woman—Estoppel—An infant married woman united with her husband in the conveyance of her land. After she arrived at age, but while still covert, she executed a receipt for an additional sum of money on account of the sale of the land. Held—That this does not estop her from asserting her right to the land upon the ground that she was an infant when she executed the conveyance.

L. T. Moore and W. M. Fulkerson for appellants.

Alex. Lackey for appellee.

STURGEON v. UNDERWOOD'S EX'OR.

Filed January 20, 1887. Appeal from Hart Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

Ejectment—Evidence—An executor suing to recover land which belonged to his testator must produce the will in order to show that he is invested with title.

W. J. Macey and J. M. Wells for appellant.

Porter & Edwards for appellee.

HAYNES v. VILEY AND CASSELL'S ASS'EE.

Filed January 20, 1887. Appeal from Fayette Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Attachments—Value of debtor's property—Where the ground for an attachment is that the plaintiff has not enough property subject to execution to satisfy the plaintiff's debt, the court, in fixing the value of the defendant's property for the purpose of determining whether the plaintiff has made out the ground for his attachment, must depend upon the opinions of witnesses, and will not assume that the property would not sell for as much under execution as when offered at private sale, although forced sales sometimes result in a great sacrifice. And where there is much doubt as to whether the property was sufficient to satisfy the plaintiff's debt, the court will not sustain the attachment.

2. Separation of conclusions—Section 332 of the Code, providing for the separation by the judge of his conclusions of law and fact, does not apply to the trial of an attachment.

Breckinridge & Shelby for appellant.

Hunt & Darnell for appellee.

HICKMAN v. TUDOR.

Filed January 20, 1887. Appeal from Mason Circuit Court. Opinion of the court by Chief Justice Pryor, remanding to Superior Court upon motion of appellant.

1. Appeals from Superior Court—Appellant sued for more than \$2,000. The circuit court upon final hearing dismissed his petition. He appealed to the Superior Court, and that court reversed the judgment, directing the circuit court to render judgment for the appellant for a certain amount, less than \$2,000. The Superior Court granted the appellee an appeal to this court, not certifying that the questions involved are novel and important.

Held—That the amount of the judgment directed by the Superior Court to be rendered against appellee is the amount in controversy, as to him, and that amount being less than \$2,000, this court has no jurisdiction of the appeal.

2. Jurisdiction—This court, not having jurisdiction of an appeal from the Superior Court, will not entertain a motion by the appellee to dismiss the appeal from the judgment of the circuit court.

Thomas R. Phister, W. H. Cord and Richards & Hines for appellant.
Wadsworth & Son for appellee.

HAZELRIGG, &c. v. BOARMAN.

Filed January 20, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Assignment of note in payment for land—Lien—H. sold land to B., the latter executing his notes for the purchase money. A lien was retained in the deed to secure the payment of the notes. At the same time B., in payment of one of the notes, assigned to H., "without recourse," a note held by him on S., which was represented to be a lien on land. H. subsequently filed his petition, alleging false and fraudulent representations as to the note on S. being a lien on land, etc., and asking a rescission of the contract of assignment and a reinstatement of his lien for the purchase money. Upon an issue tendered by B. the relief was denied. H. now claims a lien on the land sold to B. for which he received the assigned note, claiming that by the deed a lien was retained for the amount of that note as well as for the amount of the other notes executed by B. Held—That the assigned note was taken as a payment on the purchase price for the land, and to that extent no lien existed. Such was the construction placed by H. upon the transaction in his former action, the judgment in which is a bar to the present action.

G. W. Jolly and J. B. Karns for appellants.
Sweeney & Son for appellee.

SUPERIOR COURT ABSTRACTS.

ROSENBAUM & CO. v. LYTLE & CO.

Filed January 21, 1887. Appeal from Madison Circuit Court. Opinion of the court by Judge Barbour, affirming.

Banks—Rights of check holders—Where the drawer of a check has no funds in bank when the check is drawn, but subsequently deposits the money to his credit, it is as clearly appropriated to the payment of the check as if it had been on deposit when the check was drawn, and the right of the check holder is prior to that of a creditor who attaches the fund before the check is presented for payment.

C. F. & A. R. Burnam for appellants.
J. W. Caperton for appellees.

COLEMAN v. COMMONWEALTH.

Filed January 7, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Criminal practice—Waiver of objection to juror—When, in a criminal

case, a juror is presented for examination as to whether he has an actual or implied bias, and the defendant fails to make specific inquiry, he waives his right to object to the juror upon the ground that he was a member of the grand jury which found the indictment, and is not, therefore, after verdict against him, entitled to a new trial upon that ground.

In this case the Commonwealth's attorney inquired generally of the jury if they had any bias, and no answer being made, and no inquiry by the defendant, the jury were sworn. A motion for a new trial was made upon the ground that one of the jurors was a member of the grand jury which found the indictment. Held—That the defendant, by failing to inquire, waived his right to object to the juror on that ground.

2. A reversal can not be had for an error in overruling a motion for a new trial.

Ira Julian for appellant.

P. W. Hardin for appellee.

LIEB & SON v. CRADDOCK, &c.

Filed January 7, 1887. Appeal from Franklin Court of Common Pleas.

Opinion of the court by Judge Barbour, reversing.

1. Dormant partners—Where a dormant partner withdraws from the firm and persons who have dealt with the firm, knowing of his connection with it, continue to do so without notice of the withdrawal, he remains liable to them as if he were still a partner, and in an action against him to recover for goods sold to the firm after his withdrawal it is error to instruct the jury that they must believe that the goods were sold upon the faith of the plaintiffs' belief that he was still a partner. The law implies in such a case, as in the case of an ostensible partner, that the goods were sold upon the faith of his connection with the firm.

2. Burden of proof—The defendant in such a case admitting that he was a dormant partner, but alleging that the plaintiffs had no knowledge of the fact during his connection with the firm, the burden of proof is upon the plaintiffs, and they are entitled to the closing argument to the jury.

D. W. Lindsey and Marshall & Lochre for appellants.

G. W. Craddock for appellees.

COMMONWEALTH v. CASTLEMAN.

Filed January 7, 1887. Appeal from Larue Circuit Court. Opinion of the court by Judge Ward, affirming.

Indictment—An indictment which charges the defendant with "the offense of misdemeanor" does not describe any particular offense, and is insufficient upon demurrer.

Finley Shuck and P. W. Hardin for appellant.

J. W. Twyman for appellee.

COMMONWEALTH v. KING, &c. (Six Cases.)

Filed January 10, 1887. Appeals from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Local option—The voters of the civil district having, by a vote under the

general "local option" law, prohibited the sale of liquors within the district, the voters of a town forming a part of the district can not, by a separate vote under the same law, permit the sale of liquor within the town limits.

P. W. Hardin, H. L. Stone, Peters & Tyler and C. R. Brooks for appellant.
J. H. Hazelrigg and Wood & Day for appellees.

ROACH v. ROYAL, &c.

Filed January 10, 1887. Appeal from Ohio Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Parol gift of land—Rights of donee's creditors—A father placed his son in possession of land, upon which the son made valuable improvements, occupying and claiming it as his own. A creditor of the son brought this action to subject the land, alleging a gift of the land by the father to the son, making of the improvements, etc., and further alleging that the father had resumed his claim as owner to defeat plaintiffs' claim. The father claims the land, alleging that the son occupied as his tenant.

Held—That the circumstances show a gift of the land by the father to the son, and that the plaintiff is entitled to subject the land to the extent that the improvements made by the son enhanced the value of the land, the son being entitled to a lien for that amount.

C. W. Massie for appellant.

Joe Haycraft for appellees.

KENTUCKY CENTRAL R. R. CO. v. BOWEN.

Filed January 10, 1887. Appeal from Fleming Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Evidence—What the engineer of a train said about the killing of stock at a time subsequent thereto was not competent to show negligence upon the part of the railroad company, but such evidence was not prejudicial in this case, appellant having proved by one of its own witnesses that the engineer made the same statement in effect about the time the train struck the stock.

2. Presumption of negligence—Question for jury—It is not for the court to say that the statutory presumption arising from an admitted killing of stock on the track by a railroad train is removed by the evidence; that is a question of fact for the jury.

3. Burden of proof—Where the killing of stock is admitted by the railroad company it has the burden of proof, and is entitled to the conclusion in the argument to the jury.

W. H. Wadsworth & Son and J. P. McCartney for appellant.

W. J. Hendrick for appellee.

COMMONWEALTH v. GREENWELL.

Filed January 5, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Appellate jurisdiction—This court has jurisdiction of an appeal by the Commonwealth from an order overruling a demurrer to an indictment under

the act of 1884 for selling spirituous liquor without license, as the fine may exceed \$50.

2. Indictment for selling liquor—An indictment under the act of 1884 for selling liquor without license need not state the quantity sold. Any sale by retail without license is a violation of the statute.

3. Pleading exceptions—It is not necessary that an indictment under that statute should state negatively that the defendant is not a druggist or a distiller. This is matter of defense. Where provisos or exceptions are contained in a distinct clause it is not necessary to negative them.

P. W. Hardin for appellant.

John S. Kelley for appellee.

NOE v. LITSEY, ADM'R, &c.

Filed January 5, 1887. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, dismissing.

Appeals—Estoppel—One who has coerced payment of a judgment in his favor can not afterward prosecute an appeal for the purpose of reversing it.

G. W. S. Clements for appellant.

J. W. Lewis for appellees.

SOUTHERN MUTUAL LIFE INSURANCE CO. v. BEST.

Filed January 5, 1887. Appeal from Jessamine Circuit Court. Opinion of the court by Presiding Judge Bowden, overruling motion for damages.

Appeals—Damages—Damages can not be awarded on appeal after the expiration of the term at which the judgment of affirmance was rendered, the record not showing, when the judgment was rendered, that there was a supersedeas bond.

Wm. Lindsay for appellant.

Geo. Denny, Jr., for appellee.

HARTFORD FIRE INSURANCE CO. v. HAAS, &c.

Filed January 10, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming on original and cross appeal, Presiding Judge Bowden, dissenting.

1. Insurance—Reforming policy—A court of equity will not reform a policy of insurance except where, through accident, fraud or mistake, the contract has been erroneously set forth, and in all cases the mistake or error must be evidenced by undoubted proof.

In this case a mother, who owned a life estate in property, her children owning the remainder, insured it in her own name as hers absolutely. She and the children now seek to have the policy reformed so as to make it embrace the interest of the children and make them beneficiaries. Held—That the relief can not be granted, no reference being made to the interest of the children when the property was insured, and no agreement to insure their interest appearing from the proof.

2. Knowledge of agent notice to company—Where an insurance agent has general powers, and not only solicits, but is the sole judge as to whether he will take the risk, his knowledge as to the title to the property insured, and

the extent of the assured's interest, is that of the company, although obtained in a collateral transaction.

In this case the interest of the assured was known to the agent from an examination of the title made by him with a view to buying the property, which was, at the time he examined the title, covered by a policy previously issued by him, in the same form as the policy now sued upon. The application was verbal and insurance applied for by the assured in her own name as upon her absolute property, her attention not being called to a clause in the policy providing that it should be void for any misrepresentation as to title, or if the assured was not the "sole, absolute and unconditional owner of the property insured." In addition to her dower interest the assured had discharged a vendor's lien upon the property, and asserted her right to recover the amount thus paid by her in addition to the value of her dower.

Held—That the knowledge of the agent as to the title was that of the company, and that the insured is entitled to recover the value of her dower interest, and also the amount of the lien discharged by her.

3. Failure of assured to disclose interest—It is not necessary for the assured to declare, at the time of making the contract, what his interest is unless the policy requires that his interest should be disclosed.

The policy in this case not containing such a requirement, the failure of the assured to declare what her interest was does not preclude her from recovering the amount paid by her in discharging the lien.

4. Limitation a personal plea—The insurance company can not avoid liability to the extent of the interest acquired by the assured by discharging the lien, by pleading that the claim against the remaindermen for the amount thus paid is barred by limitation, even conceding that the remaindermen might defeat her claim against them by such a plea.

5. False swearing by the assured as to the extent of her interest in the property insured will not be allowed to prejudice her case, her statements having been made under a misapprehension as to her interest, and with no intent to defraud.

6. Separation of conclusions—Section 832 of the Civil Code, as to the separation of conclusions of law and fact, applies only to ordinary actions.

7. Transfers from one docket to another—It is too late for a party to move to transfer from the equity to the ordinary docket after he has learned what the judgment of the court is.

In this action brought in equity the court, after the equitable issues had been disposed of, without objection from either party, rendered judgment for plaintiff. This judgment, without any reason assigned, was, over plaintiff's objection, set aside. Defendant then, for the first time, moved to transfer to the ordinary docket. Held—That this motion came too late, and was properly overruled.

Haycraft & Slack and E. W. Hines for appellant.

Owen & Ellis for appellees.

NICHOLS' ADM'R v. BRADLEY, &c.

Filed January 10, 1887. Appeal from Robertson Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Revivor—An action may, by consent of the real representatives of a defendant who has died, be revived against them before the expiration of a year from the death of the defendant.

2. Consent order—Presumption—An order of revivor purporting to have been made by agreement, and the case having been hotly contested for three years after the order was made before judgment was rendered, the court will indulge the presumption that the order was made with the consent of the parties against whom it purports to revive the action.

3. Husband and wife—Appearance by husband—When the husband appears and defends for the wife in an action in which her right to property is assailed the judgment is not void for want of service of process on her.

W. H. Cord and Hargis & Eastin for appellant.

Winfield Buckler for appellees.

COMMONWEALTH v. SMITHERS.

Filed January 10, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Appellate jurisdiction—The "liquor law" of May 8, 1884, repealed section 6, article 25, chapter 29 of the General Statutes, and, therefore, an appeal by the Commonwealth lies from a judgment sustaining a demurrer to an indictment for selling liquor by retail without license, the punishment for the offense being a fine of \$60.

2. Liquor selling—Pleading exceptions—When a statute contains provisos and exceptions in distinct clauses it is not necessary to aver that the defendant does not come within the exceptions or to negative the provisos, much less is it necessary to aver that the defendant does not come within the provisions of a different statute conferring a special privilege upon those of a certain class.

It is not necessary that an indictment under the act of May 8, 1884, for selling liquor by retail, without license, should aver either that the defendant was not a druggist or that he was not a distiller.

P. W. Hardin and Finley Shuck for appellant.

Ben Johnson for appellee.

MONARCH v. JONES, &c.

Filed January 12, 1887. Appeal from Butler Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Trusts—Conditional sale—P., whose property was about to be sold under execution, agreed with J., a stranger to the execution, that the latter should buy the property, take the title thereto and hold it as security for the money paid, and if the property could thereafter be sold for more than the amount paid, with 10 per cent. interest thereon, and the amount of a debt which J. had against P., J. was to account to P. for the excess. A creditor of P. seeks by this action to subject his interest in the property.

Held—That the transaction between P. and J. was a common trust, enforceable by either party. It is only when the relation of debtor and creditor existed that such a contract is to be regarded as a mortgage or security for money. Therefore appellant is entitled to subject only so much of the proceeds of the property as remains after paying to J. the amounts which, by the terms of the contract, he was first to be paid out of the proceeds, first deducting from these amounts the balance of the rents received by J. after allowing him credits for existing demands he has against P.

2. Usury—As there was neither a loan nor forbearance of money, no question of usury can arise by reason of the fact that 10 per cent. interest was charged. The parties had the right to contract for the payment to J. out of the proceeds of any amount which they saw proper, and the form of the transaction is immaterial.

3. Absolute conveyance intended as trust—Parol agreements—There was no reason why the parties could not, as against appellant, create, by parol agreement, an encumbrance upon the property on account of the debt which P. owed J., the title having been made to J. before appellant acquired any lien upon the property. Moreover, appellant having invoked a parol agreement to show that an absolute conveyance was intended to operate as a trust, must take all, or none, of that agreement.

R. W. Slack and James & Helm for appellant.

E. W. Hines for appellees.

BERGEN v. FARMERS AND TRADERS BANK.

Filed January 12, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Debtor and creditor—Preference—It is not fraudulent for a debtor to give, or a creditor to procure, a preference except as it may be called in question by proceedings under the act of 1856.

James W. Head for appellant.

L. A. Weakley for appellee.

BYRD v. PETTIT, &c.

Filed January 12, 1887. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Separation of conclusions—Section 332 of the Code, which provides for the separation of conclusions of law from conclusions of fact "upon the trial of questions of fact by the court," applies to special proceedings as well as to ordinary actions.

2. Special proceedings—A proceeding by motion upon the part of an execution plaintiff against the obligors in a bond executed to suspend the sale of personal property which has been levied on is a special proceeding.

Wm. Marble for appellant.

J. R. Hewlett for appellees.

BURGEN v. COMMONWEALTH.

Filed January 12, 1887. Appeal from Kenton Criminal Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Nuisance—Evidence—Upon the trial of appellant under an indictment

against him for the maintenance of a nuisance on a lot of ground near the city of Covington, by using it as a place of deposit for garbage and filth and decaying animal and vegetable matter, a contract between him and the city for moving garbage and dead animals, whereby he undertook to remove them one mile from the city, was not competent as evidence against him, and the error in admitting it was prejudicial, it appearing that he had broken his contract with the city in that he had removed the garbage, etc., only one-half mile from the city.

2. Evidence of execution of paper—Where a paper is offered in evidence against the party by whom it purports to have been executed, the acts necessary to constitute its execution must be proved. The statement of a witness that "this is A's bond" does not prove that A signed and delivered it. It is not indispensable, however, that the witness should have been present when the acts constituting the execution occurred. An admission of A that they did occur would be competent, and, if not contradicted, probably sufficient.

J. M. Tisdale and R. H. Gray for appellant.

P. W. Hardin, Attorney-General, for appellee.

MONARCH v. MATTHEWS, &c.

Filed January 12, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Sales of personal property—The vendor of personal property can never recover the contract price for the article sold unless the title to the property has passed from the vendor to the vendee.

2. The title to personal property does not pass from the vendor to the vendee so long as anything remains to be done to the thing sold to put it into condition for sale, or to identify it, or discriminate it from other things.

In this case the appellees contracted to sell to appellant all the corn on their farm, less "enough to run the farm, say one thousand bushels." The corn was to be gathered by appellees, and was to be weighed and then delivered on a barge at the river bank. It was also to be merchantable. Held—That the title did not pass by the contract, much remaining to be done by the vendors before the contract was completed.

3. Failure of vendee to receive—Right of vendor—Where the vendor has the property and is ready and willing to deliver it and the vendee is not at the place of delivery to receive it, the vendor may set it apart as the property of the vendee at or as near the place of delivery as he can, and, considering and treating it as the property of the vendee, he may sue for and recover the contract price.

In this case the vendors gathered and put at a place of reasonable safety at or near the place of actual delivery the corn referred to in the contract, which was of the quality described. After a part of the corn was received by the vendee what remained was flooded, and the vendee received only such of it as was not injured. Prior to the flooding of the corn the vendors

were at the place of deposit, near the place of actual delivery, with hands and teams ready and willing to deliver the corn at the place of actual delivery, but for some reason the vendee refused to be there to perform his contract. If he had been there he could have received the corn before it was injured.

Held—That the title passed to the vendee, and that the vendors may recover the contract price for all the corn. Neither a renunciation of the property by the vendors, nor the weighing of the corn, was indispensable to the passing of the title.

Haycraft & Slack for appellant.

W. N. & J. J. Sweeney for appellees.

DODSON v. SCOTT.

Filed January 14, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, overruling motion.

Bills of exceptions—Time was given until a day in the next term to file a bill of exceptions. On that day the court met but adjourned without transacting any business. When the court met again the appellant asked and obtained a further extension, and on the day fixed by that order filed his bill.

Held—That the failure of appellant to file his bill, or ask a further extension, on the day to which the time was first extended was no fault of his, and as he took advantage of the first opportunity to ask a further extension, he did not forfeit his right to file his bill.

Ira Julian and Frank Chinn for appellant.

A. Duvall for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. CAMBRON.

Filed January 14, 1887. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, reversing.

1 Special verdict—Prior to the repeal of so much of the Code as provides for a special verdict, it was the duty of the court, when asked to do so, to direct the jury to find such a verdict, and for that purpose to submit to the jury all proper questions offered by either party and refuse all that were improper.

In this action against a railroad company to recover for the killing of stock it was error to refuse to submit pertinent questions offered by the defendant, as the questions submitted by the court on its own motion did not cover the same ground, one of them being as to whether the killing was "negligence," and the other as to whether it was "unavoidable." The former was a mixed question of law and fact, and, therefore, not a proper question for the jury, and the latter insufficient in the absence of other findings.

2. The court can not, by general instructions, define the meaning of terms used in questions submitted to the jury for a special verdict, as such a practice would result in a verdict special in part and general in part.

3. Railroads—Killing of stock—It was the duty of those in charge of the train to have exercised all the care usually exercised by those engaged in like service, both in managing the train and in apprehending danger to stock upon its track, or so near it as to be in danger, and in averting accidents after they were or ought reasonably to have been apprehended, and if

by this means, and with a due regard to their duty to the train and its cargo, they did see or could have seen the plaintiff's stock long enough before the killing thereof to have stopped or retarded the train, so that the stock might have escaped, then it was their duty to have done so, and the company is liable, otherwise not.

Wm. Lindsay and W. J. Lisle for appellant.

J. P. Thompson for appellee.

WOODCOCK, &c. v. SUTTON'S ADM'R.

Filed January 14, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Continuance—Surprise—The parties having announced themselves as ready, and having gone into the trial, the plaintiff was not entitled to a continuance upon the affidavit of his counsel to the effect that he was taken by surprise in that he did not expect that the defendant, who testified to an interview between himself and the plaintiff, would so testify, and that his client, if allowed the opportunity, would attend and contradict the witness, it not being claimed that the defendant had, by any statement or otherwise, misled the counsel.

2. Evidence—Transaction with decedent—The defendant's testimony for himself as to a transaction between himself and one who was dead at the time he testified was competent, the transaction having taken place in the presence of plaintiff.

C. W. Lester for appellants.

R. D. Hill for appellee.

KING, &c. v. CUMMINS.

Filed January 14, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Sheriffs—Deputy—When the sheriff executes his revenue bond it is not necessary that his deputy shall receive a special authority to enable him to collect taxes, or that there shall be a separate and additional contract before it becomes the duty of the deputy to collect taxes, if required by the sheriff to do so. The execution of the revenue bond by the sheriff makes him collector of the revenue, and makes his deputy a deputy collector, and the sureties on the deputy's bond liable for the revenue he may collect and fail to pay over.

C. W. Lester for appellants.

John Smith for appellee.

PARTIN v. SNIDER, &c.

Filed January 17, 1887. Appeal from Bell Circuit Court. Opinion of the court by Judge Barbour, affirming.

Contracts—Rewards—Where one seeks to recover of an individual a reward offered by him for the arrest of one charged with crime he must show that he has complied with the terms of the offer. Therefore, where a reward was offered by S. for the arrest and delivery of M. "to the jailer of Whitley county," the arrest and delivery of M. to the jailer of Bell county did not entitle the person making the arrest to recover the reward offered, although the courts of Bell county alone had jurisdiction of the offense with which M. was charged.

J. M. Unthank for appellant.

J. H. Tinsley for appellees.

LYTLE & CO. v. STAFFORD, &c.

Filed January 17, 1887. Appeal from Carroll Circuit Court. Opinion of the court by Judge Ward, reversing.

Judgment notwithstanding verdict—As the defendants' answer failed to present any defense, and alleged and admitted facts which make a valid defense impossible, a verdict for the defendant conferred no right to a judgment, and the plaintiffs' motion for a judgment notwithstanding the verdict should have been sustained.

Winslow & Winslow for appellants.

Masterson & Gaunt and George C. Drane for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. BATES, &c.

Filed January 17, 1887. Appeal from Carroll Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Power of court to assess damages—When, in an action for damages, the defendant fails to plead, the court may hear evidence and assess damages, but when the facts are submitted to a jury, its verdict is to be the basis of the judgment, and the court has no more right to find on the question of damages than on any other issue respecting which the jury may have failed to find.

In this action to recover damages of a railroad company for the killing of a horse it was alleged that the horse was of the value of \$125. The company answered denying negligence, but was silent as to value. The jury returned a special verdict, but there was no finding as to the damage or as to the value of the horse. The court rendered judgment for the plaintiff for \$125, the alleged value of the horse. Held—That this was error.

2. New trial—Where the verdict is not such as to entitle either party to a judgment upon it, the court should set it aside and award a new trial.

Winslow & Winslow for appellant.

Masterson & Gaunt for appellees.

BUCHANAN v. BUCKLER.

Filed January 19, 1887. Appeal from Fleming Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Partnership—An averment by defendants sued as late partners that they were partners up to a certain day, is not an averment that the partnership was then dissolved.

2. Power to bind firm—Dissolution—A partner having the power to bind the firm by notes given for articles sold to him on firm account, continues to have that power after the dissolution of the firm, before notice of the dissolution.

3. Purchase of whisky by partner—A partner had no authority to bind the firm by the purchase of whisky and the execution of the firm notes therefor unless the firm was engaged in such business as apparently included the dealing in whisky. The mere fact that a firm is a commercial partnership does not imply the right to sell whisky.

4. Expert testimony—Handwriting—In order to qualify one to testify as

an expert it must not only appear that he has had an opportunity to study and acquire skill in the particular matter, but that he has done so.

From the statement of a witness that he has been clerk of a court for many years, and has had "a large acquaintance with handwriting," it can not be inferred that he has acquired skill in the comparison of signatures, which is the special learning required of an expert witness in regard to handwriting.

W. A. Sudduth, A. Duvall and Cassidy & McCartney for appellant.

Wm. Lindsay, W. J. Hendrick and Harrison Kennedy for appellee.

NORTH MIDDLETOWN DEPOSIT BANK v. SETTLE'S ASS'EE.

Filed January 19, 1887. Appeal from Bourbon Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Usury—As long as any of the principal and legal interest of a note remains unpaid payments made go to extinguish what is left of them, and the borrower may elect to have such payments so applied, though they were made as usurious interest.

W. M. Beckner for appellant.

Charles Offutt for appellee.

ROWLAND, &c. v. MANONS, &c.

Filed January 19, 1887. Appeal from Owsley Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Stepfather and stepchildren—If a stepfather takes his stepchild into his family the relation of parent and child is established, and the stepfather can not demand compensation for maintenance and education, and the child can not claim pay for services. While sometimes even the father or mother may be permitted to assert a claim for maintenance, when the parent is poor and the child has an estate better enabling it to support itself than the parent is to support it, yet the mere fact that the parent is insolvent is not sufficient to justify a claim for compensation.

2. Guardian and ward—A guardian bought a note which he designated as his ward's. The obligor in the note procured his appointment as guardian that he might receive this note as a part of the trust estate. The former guardian, in settling with his successor, turned over the note in lieu of that amount in cash, and the note was treated as paid. The last guardian being in default the ward sued him and his sureties, and obtained a judgment against them. The sureties now sue the former guardian to recover the amount of the note turned over to his successor in lieu of that much cash. Held—That the ward could have recovered of him that sum and interest, and that the sureties of the last guardian are entitled to be substituted to the ward's rights.

H. C. Lilly & Son for appellants.

J. M. Sebastian and J. W. Rodman for appellees.

SANFORD v. CARR, TRUSTEE.

Filed January 19, 1887. Appeal from Kenton Chancery Court. Opinion of the court by Judge Ward, affirming.

1. A receiver's bond is valid although not actually executed until after the entry of the order approving the bond.

2. The bond of a receiver conditioned that he "will faithfully discharge

his duties as such and obey the orders of the court," is obligatory although no obligee is named therein.

3. Expenses of sale of property by receiver—One can not come into court after the sale of property by the court's receiver under its order and claim the proceeds, and at the same time refuse to pay the expenses of taking care of and selling the property.

Hallam & Myers for appellant.

O'Hara & Bryan for appellee.

ADAMS EXPRESS CO. v. CRAWFORD.

Filed January 19, 1887. Appeal from Breckinridge Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Common carriers—Negligence presumed—When a common carrier undertakes, but fails, to deliver an article, and does not attempt to explain or excuse the nondelivery, it will be presumed that the failure was occasioned by its negligence.

2. Contract limiting liability—The consignee is entitled to recover the value of the article notwithstanding the receipt executed to the consignor provides that the company will only be liable "for its, or its servants', fraud or gross negligence, and in no event for exceeding \$50."

W. R. Haynes for appellant.

John A. Murray for appellee.

ALEXANDER, &c. v. HUMBER.

Filed January 21, 1887. Appeal from Owen Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Reversible errors—Grounds for new trial—No error committed during the trial can be taken advantage of on appeal unless it be specifically relied upon in the grounds assigned in support of the motion for a new trial. This rule has not been affected by the repeal of the statute requiring an assignment of errors.

2. Refused instruction—The court will not reverse for the refusal to give an instruction, the meaning of which is not distinct and definite.

3. General damages are such as the law presumes to have accrued from the wrong complained of, and need not be averred. Special damages, not being necessarily implied, must be alleged.

4. In an action to recover damages for personal injuries, caused by the defendants' negligent driving, the plaintiff was entitled to recover, as general damages, compensation for all such personal injury as was the necessary and proximate consequence of the alleged wrongful act of the defendants, and this actual personal injury is not confined to wounds and bruises upon the body, but includes mental suffering—not only that endured up to the commencement of the action, but also that which continued up to and existed at the time of the trial, and that which the evidence showed would "result."

5. Negligence—Remote cause—The court properly refused to instruct the jury that there could be no recovery if the accident was unavoidable and was

"caused by forces other than within defendant's control," as the injury may have been the result of the defendant's negligence, although at the moment the accident may have been unavoidable and the force uncontrollable.

6. Evidence—Evidence that the defendants were intoxicated was competent as bearing on the question of negligence.

7. Verdicts—Affidavits of jurors to explain—The jury returned the following verdict: "We, the jury, find for plaintiff \$1,000 jointly." A few hours after they had been discharged, and after they had mingled with the heated partisans of both sides, the verdict being generally discussed, they united in an affidavit to the effect that the verdict "was written and understood by them to mean that the defendants were severally liable in the sum of \$500, and not jointly in the sum of \$1,000," and that the verdict was not their verdict. Upon this affidavit the court was asked to set the verdict aside. Held—That even if such affidavits could be received from jurors to set aside their verdicts, this court does not feel authorized to disregard the conclusion of the circuit court upholding the verdict.

W. Montfort, Montgomery, Lindsay & Botts and O'Hara & Bryan for appellants.

E. E. Settle and Thomas R. Gordon for appellee.

COLLINSWORTH v. RATCLIFFE.

Filed January 21, 1887. Appeal from Grant Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Vendor and vendee—Sale in gross—Appellee sold to appellant his one-half interest in a tract of land supposed to contain 192½ acres. The deed from appellee to appellant described the land as containing that number of acres, the amount of land being nowhere referred to except in the descriptive portion of the deed. The consideration was \$3,200. Held—That the sale was in gross and not by the acre, there being no extraneous circumstances to aid the court in determining the question.

2. Mistake—Deficit—In this action by appellee upon the note executed for the purchase money appellant claims a deficit in the land of 11 acres 2 roods and 19 poles, and asks a credit on the note sued on for one-half the value of this number of acres at the average price per acre. Held—That the deficit is not sufficient to authorize the relief sought, the question in this case depending solely upon the amount of the deficit.

Warren Montfort for appellant.

Collins & Fenley for appellee.

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*NATIONAL MUTUAL BENEFIT ASSOCIATION v. JONES,
&c.

(Filed April 27, 1886.)

1. Insurance—Waiver of forfeiture—If the practice of an insurance company and its course of dealings with the insured, and those known to him, have been such as to induce the belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their contract has induced such belief.

A member of appellant failed to pay an assessment within thirty days, as required by its charter in order to prevent a forfeiture, but afterwards paid it, and the secretary, whose duty it was to receive assessments, gave him a receipt therefor. The secretary afterwards accepted from him payment of other assessments. It had been the custom of the company, through its secretary and treasurer, to receive from members overdue assessments without question or condition. Held—That the company is estopped to insist upon a forfeiture, although its charter provides a special mode in which a member may be reinstated.

2. Amendment of pleadings—It was not error to set aside the order of submission and permit an amended answer to be filed to conform to the facts proved, and in furtherance of justice.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellees, the widow and children of Thomas Jones, deceased, brought an action to recover on a policy of insurance issued for their benefit, in his name, on February 18, 1879, by appellant, the National Mutual Benefit Association, a corpora-

[*This opinion has only recently been marked for publication.]

tion created by act of the general assembly, approved April 27, 1878. And judgment having been rendered in their favor for \$8,317.48, the company has appealed, and they also prosecute a cross appeal.

As the amended answer conformed to the facts proved and did not substantially change the defense, and the filing of it was clearly in furtherance of justice, the chancellor did not err in setting aside the order of submission and permitting it to be filed, particularly as time was afforded to the plaintiffs to take additional evidence bearing upon the question. Moreover, we are inclined to think that even without the amendment the plaintiffs could not under the charter have recovered more than was adjudged. For admitting, as stated in the petition, that the assessment would have produced \$4,000, a deduction of 20 per cent. is required by the charter therefrom.

The first ground of defense to the action is that the deceased defrauded the company in falsely representing himself, at the time he applied for membership and the policy was issued, as being a man of sober habits.

Even if there were sufficient evidence to sustain the allegation, it would not necessarily follow that the company, after having received and appropriated for an uninterrupted period of five years, all fees and assessments it was entitled under its charter to collect of the insured, could, after his death, resist payment to the beneficiaries mentioned in the policy. But it is not necessary to determine that question as there is a failure of proof to establish the fraud alleged.

The principal ground of defense is the failure on the part of the assured, Jones, to pay, within the time required by the charter, an assessment made, a notice of which he received February 2, 1883.

By section 6 of the charter it is provided that on notification by the secretary of the death of any member, each surviving member shall pay into the treasury, within thirty days from the date of the notice, the mortuary fee stipulated in the certificate of membership, which sum constitutes a fund to be

paid within sixty days from the date of proof of loss to the legal heirs or beneficiary of the deceased member, less 20 per cent. to be deducted for permanent fund and expenses.

And section 7 provides "that any member failing to pay his assessment within thirty days, as provided in section 6, shall forfeit his membership and all benefits arising therefrom; but he may be reinstated by the board if an application is made in writing, accompanied with a medical certificate of continued good health, within twelve months from date of forfeiture."

Jones, the deceased member, did not pay the assessment in question on March 3, 1883, which was the last day of payment under the charter, and according to the literal terms thereof his membership was forfeited. Nor was an application in writing to be reinstated ever made by him in due form, for he died on April 17, 1883. There is also evidence tending to show that he was not in good health when the forfeiture occurred, being afflicted with a fatal malady contracted a few months previously, and of which he died. But he did pay the assessment on the 31st of March, 1883; and the secretary of the company, whose duty and business it was to receive assessments, gave to him a written receipt therefor. There were also other assessments afterwards made upon him which he paid and for which he obtained a receipt from the secretary, the last one being made April 10, 1883.

The simple inquiry then is whether, a forfeiture having occurred, the insurance company did anything thereafter which should be regarded as a waiver of it, or by which it should be now held estopped to resist payment to the beneficiaries of the policy.

The evidence is conclusive that Jones did, in person on March 31 pay off the assessment made February 2, 1883; and Keller, who was the custodian of the books, records and funds of the company, and invested with authority to receive and receipt for all money, gave him a receipt acknowledging in full and without condition the acceptance of the payment, and the company thereafter appropriated and used it, never offer-

ing to return it, or the subsequent payment, until after his death and the commencement of this action.

It is true Keller testifies that at the time of the payment on March 31, there was a verbal agreement made by Jones that he was in good health, and that the payment was made on the faith of such assurance by him. He undertakes to explain his failure to insert in the receipt the condition upon which the payment was received by stating that the stamp, which was used to print on each receipt the condition that the member was in good health, was, on that occasion, lost or mislaid, and that, although he was unacquainted with Jones at the time, and now expresses some doubt as to his identity, he accepted the payment without any condition or assurance than the mere verbal declaration of a stranger that he was in good health.

If the testimony of the secretary and treasurer is to be accepted as true there has evidently not been such system and strict adherence to the charter in the conduct of the business of the company as is now asked to be enforced against the beneficiaries of the deceased member. And there is no reason why we should doubt the testimony of numerous witnesses given in this case, showing that it was the custom of the company, through its secretary and treasurer, to receive from members who had forfeited their policies over-due assessments without question or condition.

It does not now avail the company to say, in defense of this action, that the charter provides a special mode in which a member may be reinstated, and that the act of the secretary and treasurer in receiving assessments after forfeitures had occurred was not authorized by the president and board of directors. For he has done so in so many cases and so uniformly since the organization of the company as to render it certain the chief officers were aware of and approved it. And it has come to be so generally the practice and custom as that it can not now be disavowed or avoided without bad faith towards those who have been misled by it.

It has been often and justly said that forfeitures are so

odious in law that they will be enforced only when there is the clearest evidence that such was the intention of the parties. And "if the practice of the company and its course of dealings with the insured and others known to the insured have been such as to induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeitures as against one in whom their conduct has induced such belief." (May on Insurance, 361.)

In our opinion the proof clearly authorizes the application of that rule in this case. For not only did the company accept from Jones the over-due assessment, but subsequently recognized him as a member in good standing and received from him other assessments which he was notified to pay, and did pay. All of which we are bound to presume was done with the knowledge and by the direction of the chief officers, or else assume that the business is conducted carelessly and in bad faith to the members.

As the company refused to pay to appellees the amount due them on the policy the chancellor properly rendered judgment therefor.

Wherefore, the judgment is affirmed on the appeal and cross appeal.

Bullitt & Harris and Helm & Bruce for appellant.

Sterling B. Touey for appellees.

THE AMERICAN MUTUAL AID SOCIETY v. HELBURN,
&c.

(Filed January 8, 1887.)

1. Benefit societies—Assessments—When a benefit society relies upon the failure of any member to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the manner pointed out by the charter.

In this case appellant, resiting the recovery of death benefits because of nonpayment of assessments, should have alleged facts showing that the unpaid assessments were made by the board of directors, or by an executive committee appointed by them, as provided by its charter.

2. Pleading—An allegation that certain assessments were “duly” made by the defendant “in accordance with its charter” is but a conclusion of law, and not the averment of a fact.

Appeal from Jefferson Common Pleas Court.

Opinion of the court by Judge Bennett.

By an act of the Kentucky legislature, approved January 9, 1880, appellant was created a body-politic for the purpose of providing financial aid to the widows, orphans, heirs, legatees and assigns of its deceased members.

On the 10th day of August, 1881, Samuel Helburn became a member of appellant's society, and received a certificate of membership from appellant, by which appellant agreed to pay the appellees, sons of Samuel Helburn, in sixty days after satisfactory proof of the death of said Samuel Helburn, the sum of money to which the beneficiaries might be entitled.

The 8th section of the act provides that the beneficiary of the deceased member shall receive a benefit not to exceed \$3,000, payable within sixty days from the date of satisfactory proof of death.

On the 25th day of April, 1884, Samuel Helburn died, and appellees presented to appellant proper proof of his death, and demanded the payment of the sum of \$3,000, which they alleged was due them according to the terms of said certificate and membership of Samuel Helburn. The appellant refused to pay said sum or any part of it. Thereupon appellees brought suit in the Jefferson Court of Common Pleas against the appellant, by which they sought to recover judgment against the appellant for the sum of \$3,000.

The appellant by its answer attempted to defend the action upon the ground that Samuel Helburn in his lifetime had failed to pay some assessments made against him by the appellant to meet the payment of the policies of several members of said society who had died; and that he refused to pay said assessments, and by reason thereof he forfeited his mem-

bership in said society, and all benefits arising from his membership therein.

The lower court sustained a demurrer to the answer. Appellant then filed an amended answer to which also a demurrer was sustained. The appellant again amending its answer, a demurrer was sustained to that amendment also. Another amendment was offered, which the court rejected, and thereupon gave judgment for the appellees for the sum of \$3,000.

So much of the answer as it is material to be noted is as follows: "Defendant says that on the 1st day of February, 1884, three assessments of \$1.80 each were duly made by defendant against, and due notice thereof given to, Samuel Helburn, in accordance with the terms of said charter, upon the deaths of M. Moran, who died December 7, 1883, and Susan W. Harrison, who died December 9, 1883, and E. T. Hamilton, who died December 11, 1883, who died members of said society; and payment of said assessments, which amounted to \$5.40, was by it demanded of said Samuel Helburn, who failed and refused to pay the same."

The 8d section of appellant's charter provides that it shall be controlled by a board of directors.

The 13th section provides that the board of directors may appoint an executive committee of three to make assessments.

Section 10 provides that "upon the death of any member of the society each surviving member may be assessed, and when assessed shall pay to the secretary as follows: Members of the first class, 90 cents; members of second class, 95 cents; members of third class, \$1.15; and members of the fourth class, \$1.80."

Section 11 provides that "any member failing to pay his annual due or assessment within thirty days after notice has been served upon him or sent to him shall forfeit his membership, and all benefits arising therefrom."

Section 12 provides for the raising of a permanent fund from so much of the admission fees, annual dues and assessments

not used in paying benefits and expenses; and if said permanent fund should, at any time, reach an amount sufficiently large, in the opinion of the directors, they may have the power to suspend the assessments and pay the benefits out of said fund so long as they may think it safe to do so.

The foregoing quotations from appellant's charter show, first, that assessments to pay the benefits to the representatives of its deceased members must be made upon the surviving members of the society by its board of directors, or that they may delegate that authority to an executive committee: second, that by the direction of the board of directors the benefits due to the representatives of the society's deceased members need not be raised by assessments on its surviving members, but may be paid out of the society's permanent fund.

Thus we see that no assessment can be made on the surviving members of the society to pay the benefits due the representatives of its deceased members unless the assessments are made by the board of directors or by an executive committee appointed by them for that purpose. Also that the board of directors may dispense with the assessments on the surviving members, and direct the payment of the benefits to be made out of the permanent fund. Under the charter no legal assessment can be made upon the surviving members of the society to pay the benefits due the representatives of its deceased members, except in the manner above indicated. Also the board of directors have a discretion to dispense with said assessments, and direct the payment of the benefits out of the permanent fund; and no one but the board of directors has this power.

The question then arises before a member of the society can be compelled to pay an assessment against him, or forfeit his membership and benefits arising therefrom by reason of his failure to pay the assessment made against him, should it not appear affirmatively that the assessment was legally made, to

wit, by the board of directors themselves, or by an executive committee duly appointed by them to make the assessment on the members of the society?

In May, on Insurance, section 557, it is said: "An assessment can only be valid when laid under the conditions stated in the charter. A general vote of the directors to assess to a certain amount to pay the indebtedness of the company is no valid assessment. It must appear that such a state of affairs existed when the vote was passed as to authorize the vote itself, as that losses and expenses had actually been incurred beyond the available assets in hand, which could not be met but by an assessment. * * * The liability of the assured is conditional, and depends upon the contingency of the happening of losses and expenses to which he shall be liable to contribute, which have been duly ascertained by the directors, and which make necessary a resort to an assessment thereon. It is a credit given for a part of the consideration of the contract. The promise of the insured is to pay upon such conditions; and the existence of these conditions must be established affirmatively before a call for payment can be enforced. * * And the assessment must be made in strict accordance with the authority given. Even a more equitable mode than that provided by the charter can not be adopted. Where the charter authorizes the directors to make an assessment, it can be made by them only."

In the case of *Thomas v. Whallon*, 31 Barbour, 178, the court held that the promise of the assured is to pay upon certain conditions, and that the existence of those conditions must be shown to exist. "If the directors of the company in making the assessment acted judicially, the assessment itself perhaps would be evidence, at least prima facie, of the necessity; but they do not act judicially, but ministerially, and they have no arbitrary discretion in the matter, but they are controlled by the explicit provisions of the statute, and must, by proper averments and proof, bring themselves within the terms of those provisions before they can enforce the collection of the premium notes."

In the case of *the Long Pond Mutual Fire Insurance Co. v.*

Houghton & Hunt, 2 Gray, 279, it was held that the burden was upon the plaintiff to establish the fact of a legal assessment.

In the case of the Pacific Mutual Insurance Co. v. Guse, Missouri, 332, the court held that it devolved upon the plaintiff to aver and prove that the contingency had happened upon which the defendant's liability had become absolute; that there is no arbitrary discretion to make assessments by the directors, and that they do not act judicially, but ministerially; and assessments can not be made unless the necessity therefor properly and legally arises.

In the case of Home Insurance Co. v. Shideler, 36 Ind., 430, the court held that an assessment or apportionment was a condition precedent, necessary to be averred in the complaint, and is not complete and consummated until it is ascertained, fixed and determined by carrying out upon the extension book the amount that each member is to pay; that the directors of the company have no arbitrary discretion in making an assessment, but they are controlled by the explicit provisions of the statute, and must, by proper averments and proof, bring themselves within those terms and provisions.

Thus we see that, in making assessments by the appellant upon its members, it does not act in a judicial, but in a ministerial capacity, therefore, no presumption can arise in favor of the regularity or legality of its assessments; that the appellant's board of directors or an executive committee appointed by them are the only persons authorized by appellant's charter to make assessments against its surviving members to pay the benefits due the representatives of its deceased members; that a member of the society shall have died, and that his representative shall be entitled to a benefit arising from his death, and that an assessment upon all of the surviving members shall have been actually made by the board of directors, or an executive committee appointed by them, for the purpose of paying said assessments, are conditions precedent to the

right of the appellant to demand payment of an assessment from any of its members. And they are not bound to pay any assessment until these things occur. Nor do they forfeit their membership by reason of their failure to pay such assessments unless these things have occurred. And when the society relies upon the failure of any of its members to pay his assessment as a forfeiture of his membership and benefits under its charter, it must show affirmatively that the assessment was made in the manner indicated, otherwise the members can not be said to be in default.

The appellant's answer, tested by these rules, is radically defective. There is no allegation in it that the assessment was made by the board of directors or by an executive committee appointed by them. The allegation is that "the assessment was duly made against Samuel Helburn by defendant in accordance with its charter." The word "duly," preceding the word assessment, signifies nothing but the conclusion of the pleader. It asserts no fact. The word "assessment" does not mean that the appellant, by its board of directors, or executive committee appointed by the board of directors, made the assessment. The words "in accordance with its charter" plead merely a conclusion of law. They assert no fact. (*Ormsby v. City of Louisville*, 2 Ky. Law Rep., 299.) Neither of the amendments filed by the appellant cured this defect. Nor did the amendment offered by the appellant and rejected by the court, cure it.

For the foregoing reasons the judgment of the lower court is affirmed.

Simrall & Bodley and F. W. Morancy for appellant.

M. A. & D. A. Sachs for appellees.

PRESTON v. PRESTON, &c.

(Filed January 11, 1887.)

1. Trespass—Injunction—To enter upon land forcibly, and against the consent of the person having the title and actual possession, and deface l.i.e.

land marks or make new ones, is such a trespass as the chancellor will by injunction restrain.

2. Caveat—A party in possession and claiming title to land is not required to enter a caveat with the register in order to prevent the issuing of a grant to another, but may commence his action for that purpose in a court of chancery without resorting to the preliminary proceeding by caveat. The filing of a caveat in the register's office is a proceeding provided for by the Civil Code to prevent the emanation therefrom of a patent for vacant and unappropriated land to a claimant who is not entitled thereto where there is a controversy between conflicting claimants as to the right to a patent.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Lewis.

Appellant brought this action in equity, and in his petition states that he and those under whom he claims have been in the actual, adverse possession of a tract of land over forty years, which, previously to the acts of appellees complained of, was entered, surveyed and patented; that recently appellee Preston, without his knowledge, made an entry of — acres within his boundary and inclosure, and he and appellee Fields, who is county surveyor, and, as is averred, knows the land described in the entry is not vacant and unappropriated, have fraudulently colluded, both being insolvent, to get the title and possession of appellant's land, and, against his objection, have gone inside his inclosure and surveyed the land described in the entry by running old and making new lines and corners inside his boundary, and will, unless enjoined, proceed to carry said survey into grant.

He says that appellee Preston is setting up claim to his land, and by his acts has disturbed him in the use and enjoyment of it, lessened its vendible value, and cast a cloud upon his title. He, therefore, prays the judgment of the court enjoining appellees from entering on or surveying land inside his boundary, or depositing the plat and certificate of such survey in the register's office for the purpose of carrying it into grant, and that he be quieted in the title and possession of his land.

To the petition both a general demurrer and a demurrer to the jurisdiction of the court were filed. By the judgment the

demurrer was sustained, but whether because the petition does not state facts sufficient to constitute a cause of action, or upon the ground set out in the special demurrer that the remedy is by a caveat filed in the register's office, does not appear.

It seems to us that not only do the facts stated, which must be taken as true, constitute a cause of action, but make this a case clearly within the jurisdiction of a court of chancery, and that the remedy sought can not be amply afforded elsewhere. To enter upon land forcibly and against the consent of the person having the title and actual possession, and deface his landmarks, or make new ones, is as much a trespass as to cut and carry away his timber.

This court has more than once held, the latest case being *Hillman v. Hurley*, 6 Ky. Law Rep., 682, that an injunction will lie to restrain a defendant from continuing to trespass on land by cutting and carrying away timber when the plaintiff is the owner and in the actual possession, and the defendant is insolvent, or other circumstance exists whereby complete remedy can not be had in action at law.

There is equal reason for restraining the commission of trespass by marking lines and corners upon land already appropriated, whereby a confusion of the boundary may be produced. And if such survey has already been made a court of equity certainly has jurisdiction to enjoin the surveyor from making out and recording a plat and certificate, and the defendant from depositing a copy thereof in the register's office, with a view to carry the survey into grant. For not only do such acts disturb the owner in the possession of his land, but they cast a cloud upon his title, and consequently lessen the vendible value.

The filing of a caveat in the register's office is a proceeding provided for by the Civil Code to prevent the emanation therefrom of a patent for vacant and unappropriated land to a claimant who is not entitled thereto by reason of a prior entry and survey by another, or for some other reason. But the questions involved have at last to be tried and determined in the circuit court, where a copy of the caveat, certified by the

register, is required to be lodged; and we do not think a party in possession and claiming title to land already appropriated is required by the Civil Code to enter a caveat with the register in order to prevent the issuing of a grant to another, but may commence his action for that purpose in a court of chancery without resorting to the preliminary proceeding by caveat.

In section 473 it is provided that the caveat shall state the plaintiff's claim, and the reasons why the grant should not issue. And "it shall be verified by his affidavit, or by that of his agent, and declare that it is entered in good faith, with the intention of procuring the land for the plaintiff, and not for the benefit of the person against whom it is entered."

Manifestly that section was not intended to apply in a case where land has been already appropriated, but only where there is a controversy between conflicting claimants as to the right to a patent for land which may be vacant and subject to appropriation, for the owner of land, the title to which the Commonwealth has already been divested of, could not make an affidavit that he files a caveat with a view to procure the land for himself.

In our opinion the court had jurisdiction of this case, and, upon the facts stated in the petition, he is entitled to the relief asked, and the court erred in sustaining the demurrer.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Jas. E. Stewart for appellant.

John F. Stewart for appellees.

COLDWELL v. SEIVER & CO., &c.

(Filed January 15, 1887.)

Homestead—A debtor sold his homestead in Kentucky and removed to the State of Oregon, where he invested the proceeds in another homestead and resided seven years. He then sold his Oregon homestead and returned to Kentucky, and invested the proceeds in another homestead here. Held—That the last homestead is not exempt from a debt created while the debtor

owned his first homestead in Kentucky, as he is to be treated as if he had never before resided here.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

Appellant sold his homestead in 1875, and removed to the State of Oregon, where he purchased other property and resided seven years. At the end of that period he returned to this State and purchased another homestead, which he claims is exempt from appellee's debt created before his removal to Oregon.

If, instead of selling, he had left his former homestead unsold when he left here in 1875, it would have become, after his abandonment, clearly subject to appellee's debt. For whenever a debtor abandons his homestead with the intention of making, and does make, his residence elsewhere, in or out of this State, it ceases to be exempt from coercive sale, because no longer occupied by him as a homestead for the use of himself and family.

A debtor may sell one exempted homestead and with the proceeds purchase another alike exempt. But if he chooses to invest such proceeds in business, or other property than a homestead, even in this State, he can not afterwards purchase another that will be exempt from debts previously created. If that be so, a debtor certainly can not, after having been a resident of another State, and invested the proceeds in property there, return and purchase a homestead that is exempt from debts existing before his removal from the State. Having ceased to be a resident, he, upon his return, must be treated precisely as if he had never before been domiciled here.

This question has been settled by this court in the case of *Williams, &c. v. Rose, &c.*, 6 Ky. Law Rep., 517, where the debtor leased his homestead here and removed to another State and engaged in business, though he said he left with the intention of returning, and never abandoned his residence here. In that case it was said: "The facts of this case refute the idea of the intention to return on the part of appellees,

and if not, this court will not hold that the debtor can leave this State with his family, engage in business for years in another State, and claim his homestead here."

In that case the homestead was not sold by the debtor prior to his removal, as was done by appellant, nor, as claimed, was the residence in that case permanently abandoned. But here appellant not only sold his homestead, but invested the proceeds in another homestead in Oregon, where he went with the intention of permanently residing.

It seems to us to exempt the property of appellant from appellee's debt would be a perversion of the letter and spirit of the homestead law, and make it the means of fraud on the part of the debtor, never intended by the legislature.

Judgment affirmed.

J. W. Jones and Richards & Hines for appellant.

Ira Julian for appellees.

CUNNINGHAM v. FRAIZE.

(Filed January 13, 1887.)

Jurisdiction to settle trustee's accounts—Where an express trust is created by will or deed, and the trustee desires simply to settle his accounts, he must go to the county court where the evidence of the trust, or the writing creating it, is recorded.

Where a trust was created by a will recorded in Hardin county, the Breckinridge Circuit Court had no jurisdiction of an action by the trustee seeking a settlement of his accounts.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the year 1874 A. H. Cunningham died, in the county of Hardin, where he resided, leaving a last will, which was admitted to probate in that county. By this will he made his wife trustee for his infant children, who qualified and acted as such until her death in the year 1883. She also left a will, and her executor, who had also qualified in that county, her

will having been probated there, brought an action to settle her estate and her accounts as trustee for her children.

The circuit court in Hardin appointed the appellee, Fraize, trustee under both wills, who qualified and took possession of the trust estate. He never settled his accounts as trustee in Hardin county, but brought this action in the Breckinridge Circuit Court, seeking a settlement of his accounts in that court. The question arises, has the Breckinridge Circuit Court jurisdiction?

By section 471 of the Civil Code it is provided that "the provisions of article 14 of chapter 28, General Statutes, regulating the settlement of accounts of personal representatives and guardians, are adopted as part of this Code."

Section 472 provides that "the accounts of committees and trustees may be settled in the same manner, and the settlement shall have the same effect, as prescribed by section 471. The county court of the county in which the committee is appointed, or in which the deed or will creating the trust is recorded, shall have the jurisdiction of making the settlements."

It seems to us that where an express trust is created by will or deed probated or recorded in the county where the parties live, or where the evidence of the trust is required to be recorded, that the tribunal for settling such trusts is with the county court where the evidence of the trust, or the writing creating it, is recorded.

Such is the doctrine in regard to settlements by guardians and administrators, and where suit is to be instituted for the settlement of the trust against the trustees by the beneficiary it should be in the circuit court of the county where the trust is recorded.

Here the trustee is trying to settle in one county by a proceeding in the chancery court, when the evidence of his trust and the property acquired under it is in another county.

These beneficiaries are infants, and their accounts or claims against the trustee may require various settlements in order to ascertain the amount due each, and to have such settlements

made in various jurisdictions by different courts would create confusion, by separating the trust accounts and subjecting the action of the trustee as to allowances and credits to the supervision of different tribunals. This accounts for confining the jurisdiction to the county court, where the trustee may settle, and where the evidence of the character of his estate and the expenditures can always be found. That a trustee may apply to the circuit court of the county where the trust is recorded for its proper construction, or the beneficiary may sue in that county to enforce the trust or require a settlement, or the trustee, for other equitable reasons, may seek the aid of a court of equity, there can be no doubt, but here the trustee desires only to settle his accounts, and, therefore, should go to the county court of Hardin and make his settlement.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

Bacon & Stites for appellant.

CHAMPION v. MUNDAY.

(Filed January 11, 1887.)

1. Passways—Statute of frauds—Where an agreement by the vendee to give the vendor a passway over other land forms a part of the consideration for the sale and conveyance of land, and the vendee is placed in possession of the land sold and conveyed, and the grantor in the use of the passway, the former will not be allowed to prevent the latter from using the passway upon the ground that the contract therefor was within the statute of frauds, as a court of equity will not allow the vendee to hold the land and at the same time refuse to pay for it.

2. Deeds—Consideration—The recital of a particular consideration in a deed does not prevent other or further consideration from being shown.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Holt.

If A sells a tract of land to B which is surrounded by other land of A, then B is entitled to a passway out through such other land of A.

So if A sell land surrounding other land belonging to him to which he can have access only over the granted premises, he, by implication, reserves a way over the same, although he has conveyed with covenant of warranty. It is a way of necessity. This case, however, is not either of those stated. The appellee, Munday, prior to the sale by him to the appellant, Champion, of the forty-nine acre tract of land could pass from his home tract to and over it and thence, by permission, over the Graves land to the lane between the Newton and McGarvey land, and by it to the Lexington and Harrodsburg turnpike. His home place of 120 acres did not adjoin any public road.

On April 15, 1881, he sold the forty-nine acres to Champion, the consideration being, as he says, \$2,000 and a passway from his home place through the adjoining home place of Champion, it to be the one also used by the latter, whose place also did not adjoin any public road, the outlet from it being along the west line of the forty-nine acre tract to the Graves land, and thence to the turnpike by the route above named. He says that he was also to have one-half of the wheat then on the land. The deed from Munday to Champion, dated April 15, 1881, recited the consideration as \$1,800; but this does not prevent other or further consideration from being shown. (*Davenport v. McCampbell*, 17 B. M., 42; *Gordon's Heirs v. Gordon*, 1 Met., 257.)

The parties agree that the money to be paid was \$2,000.

The appellant in his pleadings denies that the appellee was to have a passway of any character, either personal to him and his family, or one appurtenant to his home place, through the home place of the appellant. In his testimony, however, he substantially admits, and his able counsel appears to assume in the argument, that the appellee and his family were to have the right to pass through, but that the privilege was to be confined to them, and be a mere permissive passway. So that we may regard the question as being whether the contract was for a passway personal to Munday and his family, or one appurtenant to his home place; and if the latter, then whether

it can be enforced, as it is not evidenced by any writing signed by Champion.

It is hardly reasonable to suppose that the appellee would have sold the forty-nine acre tract, thus cutting off his outlet from his home farm to the public road, without reserving some way of egress from it. He says that he, in the sale of the forty-nine acre tract, and as a part of the consideration, bought a passway through the home farm of the appellant. The latter contradicts this; but the deed recites: "The said R. P. Munday is to have a passway from his house as far as said Champon's land goes to the Lexington turnpike over the land of said Champion on the same route the said Champion now travels;" and the testimony shows that from the time of the making of the deed until the bringing of this suit the appellee has been passing through the home farm of the appellant.

Considering the testimony in the record, the recitation *supra* in the deed, and the circumstances surrounding the transaction, we do not feel authorized to disturb the conclusion of the lower court, which found that a passway through the appellant's land appurtenant to the appellee's home place was a part of the consideration for the conveyance of the forty-nine acre tract of land.

As the deed was not signed by the appellant, nor any writing executed by him evidencing the appellee's right to the passway, it is urged that the contract is within the statute of frauds, and can not be enforced. If simply a passway over the land sold had been reserved by the deed, then of course this question would not arise; but the right is claimed to a passway through other land belonging to the appellant. Equity following the law will not enforce a contract within the statute. Here, however, it has been executed upon the part of the appellee; and the appellant accepted the deed and had it recorded. There is no offer by him to rescind. He placed the appellee in the use of the passway while he is in possession of the property; and a court of equity will not, under these circumstances, permit him to hold it, and yet refuse to pay for it. If he declines

the one, he must do the other; otherwise the statute would become a means of injustice, and enable a party to commit a fraud, thus defeating the very object of its enactment.

Judgment affirmed.

Thompson & Roach for appellant.

Poston & Jacobs and Bell & Wilson for appellee.

BISHOP v. LAWRENCE.

(Filed January 11, 1887.)

Time of essence of contract—Waiver—Where an obligation for the payment of borrowed money, without security, provides for its payment in monthly installments, and further provides that upon default in the payment of any installment the whole debt shall become due, time is of the essence of the contract, and a failure to pay any installment when due gives the creditor the right to demand and receive the whole debt: and any waiver of the default, to be binding, must be by agreement, upon a sufficient consideration. The mere acceptance by the creditor of a payment upon the whole debt of the amount of any unpaid monthly installment as to which the debtor is in default, does not authorize the presumption of a waiver by the creditor of the default, there being no equity in favor of the debtor to authorize such a presumption.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Bennett.

The appellant, on the 28th day of March, 1883, executed and delivered to the appellee his written obligation, which reads as follows:

“I this day borrowed \$200 of Wm. S. Lawrence, and I agree to pay him the twelfth part of the amount at the expiration of every month, and the interest at 8 per cent; and this note is to be put in the Clark County National Bank. I agree to have the money in the bank at the end of every month, so that this note can be credited with the amount that I have agreed to pay the said Wm. S. Lawrence, and in case I make a failure this note is due at the end of any month.”

The appellee in his petition on said note, after setting it out, alleged that the appellant “wholly failed and refused to

pay the installment in said debt which was due on the 28th of April, 1883, when it became due, and said note was, by the terms of said writing, then due. And said defendant has not paid any part of said debt except \$10 on the — day of —, 1883, and \$18 on the 17th of May, 1883, though it is all due."

The appellant in his answer alleged "that on the — day of May, 1883, and before the institution of this suit, he paid to the plaintiff \$18, in part payment of the debt sued on, and said plaintiff accepted said money in payment of one-twelfth part of said debt, and the interest due thereon for one month and waived the breach of contract complained of in his suit."

The allegations of the appellee's petition, that the writing sued on was given in consideration of money loaned appellant by appellee, and that the whole amount of said money was to become due on the 28th of April, 1883, if appellant failed to pay one-twelfth part of it and the interest thereon that day; and that he wholly failed and refused to pay said twelfth part on that day; and by reason of said failure to pay said twelfth part the whole of said money was due; and that said defendant since then had failed to pay any part of said debt, referring to the whole sum, except \$10 and \$18, not being denied by appellant, must be taken as true.

The question then is: Is the appellant's answer a sufficient plea in avoidance of the payment of said debt?

His allegation is "that on the — day of May, 1883, he paid the plaintiff \$18 in part payment of the debt sued on." The whole debt was sued on as due, and the appellant, by the language quoted, admits that he paid \$18 in part payment on the whole debt. The note or obligation was credited with \$10 and \$18, as part payment on the whole debt. The appellant failed to deny, and thereby admitted that the credit thus entered was correct.

Appellant then alleged that "the plaintiff accepted said money in payment of one-twelfth part of said debt, and the interest due thereon for one month." But he had already said

that he paid it on the whole debt, and admits that appellee's entry of it as a credit on the whole debt was correct. So the allegations stand thus: That appellant paid \$18 on the whole debt and that appellee credited the whole debt with the \$18, but accepted it in payment of one-twelfth part of the debt.

So the failure of the appellant to allege that he paid the appellee the \$18 in discharge of the first installment due on the contract, and that it was accepted by the appellee as such payment by an agreement between them, renders the allegations in the answer, that appellee "accepted said money in payment of one-twelfth of said debt and the interest due thereon for one month, and waived the breach of contract complained of in his suit," ineffectual as a plea in avoidance. It is merely the conclusion of the pleader.

The appellant was a man of very limited means. The appellee loaned him \$200 without security. The loan was evidently made to release the appellant of some pressing necessity. And as a means of assuring the payment of said money they agreed that the appellant should pay one-twelfth part of the sum at the end of each month, together with interest thereon until the whole debt was paid; and if he made default in any of the monthly payments, then the whole debt was to be due. So we see that time was of the essence of the contract. The appellee's security depended upon the punctilious discharge of the contract by appellant according to its terms.

It is unlike an executory contract where both parties agreed to do something in the future—both the consideration and the performance are before them. In such a case the performance may be waived without any new consideration for it, because no property or other thing of value having passed from one to the other, the parties will be left in statu quo. It is unlike a forfeiture, contained in a lease for the nonpayment of rent. There, if the landlord receives the rent accruing after forfeiture, he thereby waives the forfeiture, because his condition is not worsened; he is still the owner of the land, and has received

the stipulated price for its use; and forfeitures not being favored in law, the courts will take hold of slight circumstances to receive against them, if it can be done without violating the substantial rights of the parties. It is unlike a forfeiting clause in a contract for the sale of land, providing for the forfeiture of the contract and the reversion of the land to the vendor if the vendee fails to make payment of the purchase money at some specified time. If the vendor receive the payment of the purchase money, or a part of it, after the time specified, this will be waiver of the forfeiture, because time, in such cases, is not ordinarily of the essence of the contract, for the reason that the purchase money is ordinarily secured by lien, and the payment of the money, though not at the time agreed, is a substantial compliance with the contract.

And so, generally, when forfeitures and conditions are annexed to contracts for the sole benefit of one party, the enforcement of which would be inequitable, the courts will take hold of any fact or circumstance, though slight, indicating a purpose to waive the forfeiture or condition so as to carry out their contract according to its substance.

Here the appellee had loaned his money to the appellant. The loss by the failure of the appellant to pay would fall alone upon the appellee. His security for the payment of the money consisted in the prompt payment of the monthly installments, therefore, time was of the essence of the contract. The prompt payment of the monthly installments was the substantive consideration for making the loan; and a failure to make these payments promptly was a substantial violation of the contract, and the loss resulting therefrom would fall upon the appellee alone, and the appellant would be the gainer. Therefore, there could be no binding waiver of the default of the appellant unless the waiver was made by contract upon a sufficient consideration. Had the appellant and appellee, in consideration of the payment of the installment after it was due, agreed to waive the default, the consideration of appellee's continuing to receive more advantageous interest than 6 per cent. would

probably be sufficient to sustain the agreement. This, however, is not necessary to decide, as no agreement is averred in the answer.

So, also, upon the failure of the appellant to pay the first installment on the 28th of April, 1883, the whole debt was then due and the appellee had the right to demand and receive the whole debt without being guilty of any unconscionable advantage of the appellant, as he would simply receive what was justly his due without imposing any unjust burden upon the appellant. Therefore, the appellee had the right to receive the \$18 on the whole debt, because, as aforesaid, the whole debt was justly due; and no presumption would arise, from the simple fact of the reception of the \$18, that the default of appellant was waived and his right to pay the debt by monthly installments restored, because there was no equity in his favor to authorize such a presumption.

The appellant's answer being fatally defective the judgment of the lower court is affirmed.

Haggard & Benton for appellant.

W. M. Beckner for appellee.

SMITH, ADM'R, &c. v. MEEK.

(Filed January 15, 1887.)

Contracts—Consideration—M. owned a life estate in one-third of a tract of land, the remainder belonging to her children. L. made a verbal contract with her to give her \$1,800 for the land if she would have it sold by a decree of the circuit court. Pursuant to that agreement she did have it sold, and at the commissioner's sale L. purchased the land for \$1,460, which he paid, and received a deed from the commissioner. M. seeks to recover on the note for \$1,800. Held—That the consideration for the agreement was sufficient, and that the plaintiff is entitled to recover on the note, subject to a credit of \$1,460.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bennett.

On the 18th of November, 1881, Wm. A. Long, now deceased, executed to appellee his promissory note for \$1,075, due May

1, 1882. On the same day he executed to appellee another promissory note for \$742.50, due May 1, 1883.

Both notes recite that they were given in consideration of a tract of land, and that they were to be void if a deed was not made to the land.

Appellee brought suit on these notes against the appellant as the administrator of Wm. A. Long.

Their answer to the suit discloses the fact that the notes were given for the purchase price of a tract of land which belonged to the children of the appellee, she owning a life interest or dower in one-third of the land; that it was agreed between the appellee and Long that he would give to the appellee \$1,800 for said land provided she would have it sold by a decree of the circuit court; that she, pursuant to said agreement, did have the land sold by a decree of the circuit court, and at the commissioner's sale Long bought the land at the price of \$1,460, which he paid to the commissioner; that the court confirmed the sale, and the commissioner made him a deed to the land, which was approved by the court. It also appears that the sale of the land under the decree of the court has never been disturbed.

The appellants now contend that as the appellee owned only a life interest in one-third of the land, and as the agreement between her and Long was verbal, the contract was void; and that the notes were, therefore, without consideration and not binding.

The agreement in effect was that if appellee would have the land sold by a decree of the court Long would give \$1,800 for it, and to that end executed to appellee his notes for that amount. The appellee, pursuant to that agreement, did procure a sale of the land by a decree of court. Long purchased it for the sum of \$1,460, and received the commissioner's deed for the land. He agreed to give appellee \$1,800 for the land if she would procure a sale of it by a decree of court, whereby he could obtain a good title to the land. This appellee did. Long, pursuant to this agreement, bought the land at the sale,

and received a good title to it. Now it seems to us that the consideration for the agreement was sufficient.

Therefore, the lower court did right in giving judgment for the appellee against the appellants as administrators of Wm. A. Long on the notes, subject to a credit of \$1,460, the price bid for the land at the commissioner's sale.

The judgment is affirmed.

Martin & Ratcliffe for appellants.

L. T. Applegate for appellee.

SHERLEY v. TRABUE.

(Filed January 21, 1887.)

Recovery of usury—A borrower may, by an action at law, recover usury paid by him either upon a judgment at law or in equity.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Holt.

A judgment by default was rendered in equity upon a note containing usury, and which was secured by a mortgage upon land.

The usury having been paid, this action at law was brought within the statutory period to recover it back. The judgment in equity is relied upon as a bar.

The General Statutes, chapter 60, section 3, provide: "A court of equity may grant relief for any such excess of interest, and to that end compel the necessary discovery from the lender or forbearer.

"Section 4: Such excess of interest may be recovered from the lender or forbearer, although the payment thereof was made to his assignee."

It has been said that judgment can not be rendered against judgment in a court of law, or a decree against a decree in equity; and it is now urged that an action at law can not be maintained to overturn a judgment either at law or in equity.

Accordingly it was held in the case of *Thompson v. Ware*, 8 B. M., 26, that a bill in chancery would not lie to enjoin a

judgment at law upon the ground that it embraced usury. The court in *arguendo* took a wide range in this case; but the above point is the only one that can be considered as having been decided by it, as it was the only one involved. It was not an action to recover back usury paid either upon a decree or a judgment at law.

The like question was presented in *Moran v. Woodyard*, 8 B. M., 537, where the court, however, went so far as to recognize that under some circumstances a decree may be opposed to a decree, because it was there said that one might be enjoined upon grounds which would support a bill of review.

The question now before us, however, is not whether a judgment can be opposed to a judgment, or a decree to a decree; but whether usury paid upon a judgment in equity can be recovered back. It is conceded that if it be paid upon one at law, it may be recovered by suit in equity. If this distinction exists, it must either be because of statutory requirement, or because it is grounded in reason.

A review of the various statutes upon the subject, and of the judicial construction which has been given to them, may throw some light upon the question.

By the provisions of the act of 1798 (2 M. & B., 852), under which *Pearce v. Hedrick*, 3 Litt., 109, was decided, the plea of usury was available to defeat the claim in toto; but the borrower had the right to a discovery by a bill in chancery, and then, if usury appeared, the chancellor relieved against the interest, the borrower paying the principal of the debt.

He also had the right to pay the usury, and then recover it back by a bill in chancery. This was also true under the usury act of 1819. (2 M. & B., 856).

We have been unable, however, to find any adjudication of the question whether, under the acts *supra*, usury which had been paid upon a decree could be recovered by suit.

The provisions of the Revised Statutes adopted in 1852 upon this subject are similar to those of the General Statutes now

in force, save that the provision hereinafter cited relating to limitation was not contained in the former.

The seventeenth section of the present Civil Code is in substance the same as the fourteenth section of the Code of 1851, and it provides:

“A judgment obtained in an ordinary action shall not be annulled nor modified by any order in an equitable action except for a defense which arises or is discovered after rendition of the judgment. But such judgment does not prevent the recovery of any claim which was not, though it might have been, used as a defense by way of set-off or counterclaim in the action.”

In accordance with this provision and previous decisions it was held in the case of *Chinn v. Mitchell*, 2 Met., 92, that a judgment at law could not be enjoined upon the ground that it contained usury; but it was also decided, as in the subsequent case of *Ross v. Ross*, 3 Met., 274, that after the payment of it the borrower could recover it back by suit.

The first-named case names no forum as exclusive for this purpose; while the other says that it can be done by a suit in equity.

We perceive no good reason for a distinction between the payment of usury upon a decree in equity and a judgment at law.

A borrower is allowed to reclaim money paid as usury upon the ground that it was extorted from him by his necessitous condition, and the pressure of the lender. This being so, why should he not recover it whether paid upon the one or the other? The statute says that the “excess of interest may be recovered from the lender or forbearer, although the payment thereof was made to the assignee.” In connection with it section 4 of chapter 71 of the General Statutes should be considered. It provides: “And no action shall be prosecuted in any of the courts of this Commonwealth for the recovery of usury theretofore paid, for the loan or forbearance of money, or other thing, against the loaner or forbearer, or assignee, or either,

unless the same shall have been instituted within one year next after the payment thereof; and this limitation shall apply to all payments made on all demands, whether evidenced by writing or existing in parol."

The limitation is made to apply to "all payments made on all demands;" and the two provisions of the statute, when considered together, authorize the recovery of money paid as usury, whether upon a judgment at law or a decree in equity.

There is no opposing of a decree to a decree. The relief sought does not annul or modify a judgment. It has been satisfied. The borrower sues to recover from the lender that which he had no right to exact, and which was paid without any consideration. The right to recover it does not accrue until the payment. There is no modification or change of the former judgment; but a new and distinct cause of action arises in favor of the borrower and against the lender upon the payment of the usury. The law then raises a promise by implication of repayment. A cause of action, by virtue of the statute, arises *eo instanti* in the borrower's favor.

Nor do we see any reason why he can not recover it by an action at law. His right of recovery rests upon a statutory provision, which fixes no particular forum and does not limit him to an equitable action. If he seeks a discovery of usury he must go into equity; but where he has paid it, there is a mere claim for money received by the lender to which he, in good conscience, was not entitled.

Our conclusion is that the borrower may recover usury paid by him, either upon a judgment at law or in equity; and that he may do so by an action at law; and the amount of usury being admitted by the pleadings, the judgment below is reversed, with directions to render a judgment for the appellant for the amount claimed in his petition.

Boles & Duff and W. P. D. Bush for appellant.

J. B. Leslie for appellee.

WILLIS, &c. v. COMMONWEALTH.

(Filed January 20, 1887.)

1. When trial for felony begins—The trial of an indictment for felony does not begin until the issue is formed and the jury is sworn to try it.

2. Exonerated of bail—After the trial has begun the defendant is in custody of the proper officer of the court, and the bail is no longer amenable for his appearance unless they appear personally in court and consent that he remain on bail. But in order to be exonerated before the trial begins the bail must either surrender the defendant to the jailer, as provided in chapter 2, title 5, of the Criminal Code, or to the custody of the court while in session, which must be shown by the record to have been done.

Appeal from Cumberland Circuit Court.

Opinion of the court by Judge Lewis.

By the terms of the bond given by appellants as bail for Strange, charged with murder, they undertook that he should appear in the Cumberland Circuit Court to answer the charge, and at all times render himself amenable to the orders and process of said court in the prosecution of said charge.

They did not, at any time before the forfeiture of their bond, surrender the defendant to the jailer of the county, but they were still bound when he appeared in court at the June term, 1883, and the question is presented whether anything was after that done by the court or by them, which, under the Criminal Code, exonerated them.

It appears that the motion for a continuance at that term was overruled, and the accused required to go into the trial; and ten jurors were selected and accepted by the Commonwealth and the accused. But the court adjourned for the day without completing the formation of the trial jury. And the next day the court, on its own motion, discharged the ten jurors and continued the case until the next term, because the officer in whose charge they were placed permitted them to separate contrary to law and the injunction of the court.

Section 229 of the Code provides that during the trial of an indictment for felony the defendant shall be committed to and remain in the custody of the proper officer. But by sec-

tion 183 it is provided that if the indictment be for a felony the defendant must be present, and shall remain in actual custody during the trial, unless his bail appear personally in court and consent that he may remain on bail, in which case he shall be placed in actual custody when the case is finally submitted to the jury.

After the trial has commenced the defendant is in custody of the proper officer of the court, and the bail is no longer answerable for his appearance unless, as provided in section 183, they appear personally in court and consent that he remain on bail. But in order to be exonerated before the trial commences it is necessary for the bail to either surrender the defendant to the jailer, as provided in chapter 2, title 5, or to the custody of the court while in session, which must be shown by the record to have been done.

It does not appear from the record in this case that the bail surrendered or offered to surrender the defendant to the court. On the contrary, it is recited in the order book that the defendant came into court in proper person, but not in discharge of his bail bond, and the same recital is made in reference to his appearance on the day the ten jurors were discharged, and at the next term of the court. But if the defendant, at any time, by operation of law, was taken out of the custody of the bail and placed in that of the court, a subsequent recital in the order book would not bind them unless by their consent.

The decisive inquiry then is, when does the trial of an indictment for felony, in the meaning of section 229, begin? It seems to us it can not, with propriety or accuracy, be said to begin until the issue is formed and the jury sworn to try it. For, as has been held by this court, the defendant can not be regarded as being in jeopardy of his life or liberty until then. Everything done previously is merely preliminary to the trial.

Judgment affirmed, with damages.

Jas. Garnett for appellant.

P. W. Hardin and S. M. Payton for appellee.

SCHMIDT v. ABRAHAM LINCOLN LODGE.

(Filed December 2, 1886.)

1. Benefit societies—Rights of expelled members—Where a benefit society has provided the method for the expulsion of its members the courts will not undertake to supervise its action by determining that its judgment of expulsion in a particular case was not in accordance with its by-laws, or was for causes that had no foundation in fact; but where the expelled member has appealed to a higher tribunal within the order, as provided by its rules, and that tribunal has reversed the decision of the inferior tribunal, and ordered it to restore the expelled member to all the privileges of the order, he will be treated by the courts as a member where his right to share in the funds of the society is involved, provided the appellate tribunal within the order is without power to enforce its order of restoration. The chancellor, however, can not restore the expelled member to membership, or require that he shall be permitted to attend the stated meetings of the society.

2. Mandamus will not lie to compel the officers of a benefit society to restore an expelled member.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

Abraham Lincoln Lodge, the appellee herein, was incorporated by an act of the legislature approved January 29, 1870, and by the provisions of its charter the association was authorized to make a constitution and by-laws for the government of its members; also by section 3 to levy and collect fees for membership and stated dues, to prescribe its own mode of paying or loaning out its surplus money or to invest it; also to create a treasury for the support of sick and unfortunate members, and, in case of death, to aid their widows and children.

The appellant, Schmidt, was one of the incorporators and a member of the order, and had been for a number of years, paying his annual dues with the other members, from which a considerable fund was raised for the charitable objects contemplated by the organization. He executed to the corporation his note for the money in controversy, it being a part of the fund belonging to the association.

This action was brought on the note by the corporation, and the defense interposed by the original answer of the appellee

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is that he had been unlawfully and wrongfully expelled from all the privileges and benefits of the association, and was, therefore, entitled to his proportionate share of the fund with the other members, and that this share would exceed the amount of the note sued on; that the funds of the association are loaned out to the members, and the sum evidenced by the note was so loaned to him. It is also alleged that, in addition to the fund arising from the dues or fees paid, a still larger fund has been accumulated by the association. He asks that the case be transferred to equity, and an equitable distribution made between the members, and for all other proper relief.

To this answer a demurrer was sustained, and we think properly, because, in becoming a member, the appellant agreed to abide by such rules and regulations as might be adopted by the organization for the control of its funds and the government of its members, and the association providing the method for the expulsion of its members, this court will not undertake to supervise its action by determining that its judgment was not in accordance with its by-laws, or for causes that had no foundation in fact. The tribunal existing within the organization must alone determine such a question.

An amended answer was filed by the appellant that is entitled to more consideration, and if the facts alleged are true, and they must be so regarded on the demurrer filed to that pleading, the appellant is entitled to some relief.

It is alleged by the appellant in his amended answer that he appealed from the judgment of expulsion to a higher court, as provided by the rules of the order, a court having complete jurisdiction of the rights involved, and that court (the Grand Lodge) reversed the judgment of the inferior tribunal, and ordered it to restore the appellant to all the privileges of the order; that the appellee refused to obey the order, and still excludes the appellant from all the privileges and benefits of the association, and if the averments of the amended answer are sustained the expulsion becomes permanent by the mere arbitrary will of the appellee no longer entitled to any of the

benefits of the order, or to enjoy any portion of the fund that his means have aided in creating unless a court of equity can interpose. The cases cited by counsel for the appellee only decide that in this character of associations, where the member has been expelled, or his rights determined by a tribunal of his own selection, relief will be denied him by the judicial tribunals of the country for that reason, until they stop to inquire whether the action of the judicature of the society was irregular or the expulsion made without cause.

Some of the authorities maintain that mandamus is the proper remedy for such a wrongful act, but this court, in the case of *Cook v. The College of Physicians and Surgeons*, 9 Bush, 541, in construing the provisions of the Code of Practice relating to this writ, held that whatever might have been the common law rule, the legislature had restricted the application of the writ in this State by confining it to executive or ministerial officers, who had failed to perform or omitted to do some act, the performance or omission of which is enjoined by law.

The officers of this association are neither executive nor ministerial officers within the meaning of the Code, and can not be reached by such a proceeding.

The case then stands with the appellant a member of the association, who has paid his dues and is interested in the fund, and still denied the right to enjoy any of its benefits. The chancellor will not or can not restore him to membership, or require that he shall be permitted to attend their stated meetings, but he can say that this corporation is the trustee for its members, and holds the money for the benefit of each and every member for the objects contemplated by the charter, and should withhold relief by refusing judgment for the appellee until complete equity is done appellant. The specific relief to which the appellant is entitled can not well be determined upon the demurrer to the answer as amended. How much money he has paid in or the amount paid to him by way of benefits does not appear, but his right to participate in the

fund clearly exists if his statements are true. This is based on the idea that the Grand Lodge is without power (as seems to be conceded by counsel) to enforce the order of restoration, for if it has, the chancellor will not interfere.

We find no such power in the charter before us, nor has our attention been called to any rule by by-law on the subject. The right of property is involved in this controversy, and a majority of those in interest have no such arbitrary power as to deny to the minority or one of its members the right to participate in the benefits arising from the common fund. If the member is expelled and the order stands unreversed he is not a member, but as the case is presented by the pleadings the appellant, being a member with all the rights and privileges enjoyed by those associated with him, can not be deprived of his interest.

The note evidences a part of this fund, and the chancellor should not coerce its payment until this case is heard on the merits, as the amended answer, standing confessed, entitles the appellant to relief.

The judgment below is reversed and cause remanded, with directions to overrule the demurrer to the answer as amended and for proceedings consistent with this opinion.

A. Duvall for appellant.

Glenn & Tisdale for appellee.

COTTON, TRUSTEE v. GRAHAM, &c.

(Filed January 6, 1887.)

1. Meritorious consideration—While the obligation to provide for a wife or child constitutes a meritorious consideration for an undertaking to pay money, a voluntary agreement to provide for a collateral relation, as a sister-in law, will not be enforced.

2. Contracts—Consideration—Where several persons jointly undertake to pay a sum of money, the sole consideration as to each of the obligors being the joint undertaking, the contract will not be enforced where no one of the obligors has performed his part of the contract; and the payment of interest

by one of the obligors is not such a performance as will authorize the enforcement of the contract against the other obligors.

3. Trusts—Where a trust is created by an undertaking to pay to one, as trustee for another, a sum of money, to be invested by him for the beneficiary, the mere acceptance of the trust constitutes no consideration for the undertaking to pay the money, which can not, in the absence of a consideration, be enforced.

4. Mortgage—Consideration—A mortgage executed to secure a note which is without either a valuable or a meritorious consideration will not be enforced.

5. Promissory note—Consideration—A promissory note which recites that it is "for value received and in consideration of love and affection," imports a valuable consideration, and a petition upon such a note, averring in substance that the consideration was "value received" and "love and affection," it was error to sustain a demurrer thereto.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

The appellees, who describe themselves as legatees of Samuel Parker, deceased, executed to Charles B. Cotton, as trustee for Amelia Parker, wife of Wm. Parker, deceased, their joint and several obligation for the sum of \$5,000, payable on the 1st of March, 1875. The consideration of the obligation is "for value received, and out of love and affection, we have for her as the wife of our brother, Wm. Parker, deceased."

They further agreed to secure the payment of the promised sum by executing a mortgage to the trustee on a tract of sixty-two acres of land lying in the county of Jefferson. The trust was accepted by Cotton, and by its terms he was to invest, at his discretion, the proceeds of the note in interest-bearing bonds, the annual income to be paid to the beneficiary, with the right on her part to dispose of the whole sum at her death by will or otherwise. The mortgage was executed as the original trust provided, and the obligors failing to pay the note the trustee instituted the present action in equity asking a judgment for the debt, and a sale of the mortgaged property to pay it.

A demurrer was filed to the petition and sustained on the ground that the consideration alleged was not sufficient to support the promise or agreement to pay.

It is assumed in argument that the statements of the petition show only the consideration of love and affection on the part of the appellees for the execution of the obligation for the benefit of their sister-in-law, Mrs. Parker, and that such a consideration, where the relationship is so remote or where none in fact existed, except such as sprung from the marital relation that existed between their deceased brother and his wife, will not support the agreement to pay.

If the facts alleged authorized the conclusion reached by counsel and the court below, there would be less difficulty in determining the question involved. This court has heretofore held in several cases that a voluntary agreement to provide for a collateral relation will not be specifically enforced. The obligation to provide for a wife or child constitutes such a meritorious consideration as will authorize a court of equity to enforce it, but, as said in *Buford v. McKee, &c.*, 1 Dana, —, "the whole foundation of the principle which turns mere gratuitous engagements and voluntary promises of bounty and munificence into contracts of obligatory efficacy is of such doubtful equity that we feel no disposition to carry it further than it has already gone." That was a case where Henry Paulding had executed a covenant to Buford, his nephew, for the conveyance of a tract of land at his (Paulding's) death, and on a bill filed to enforce the covenant the relief was denied. (*McIntyre v. Hughes*, 4 Bibb, 187; *Stovall v. Barnett*, 4 Littell, 207; *Ford v. Ellingwood*, 3 Met., 324; *Arnold v. Park*, 8 Bush, 3.)

The case of *Graves v. Graves*, 7 Ben Monroe, 213, is relied on by counsel for the appellant as sustaining his right to recover. In that case there was a verbal agreement between the brothers and sister of the appellant by which they were to make an equal contribution to the appellant (their brother) in order that he might have as much of the estate of their father as they had received, and in pursuance of the agreement some of the brothers paid their portion of what they had agreed to contribute, and the appellee (another brother) refused to pay any sum whatever on the ground of a want of consideration. It was said in that case that "the contract, when act-

ually entered into, furnished a sufficient consideration to make it binding on all, and that a failure of any one to perform his undertaking, and especially after others had performed theirs, would be a breach not only of moral, but of legal duty to them." The court, however, in reversing that case directed the court below to instruct the jury that if such a mutual agreement had been made, and that one of the brothers, in consequence of that agreement, had advanced to the plaintiff a slave, and the others had executed their notes for a sum equal to the estimated value of the slave, and the note in question was the one thus executed by the defendant, the consideration was sufficient, and the plaintiff entitled to recover. The court was careful not to base the instruction on the idea that the mere agreement entered into between the parties was a sufficient consideration to authorize the recovery; and in the subsequent case of *Mark v. Clark and Wife*, 11 B. M., 44, this court, in alluding to the case of *Graves v. Graves*, said: "The mutual promise of each, and the fulfillment of the promise by the most of them, was held (in that case) to constitute a sufficient and valuable consideration for the promise of the defendant. It is not settled in that case, or in any other of which we have any knowledge, either that the affection of an uncle for his niece, or an agreement by one heir under no legal obligation whatever to his co-heir to make that co-heir equal to the advancements made to himself or to others, does form such a consideration as will make enforceable a note or bond to pay a sum of money for that purpose. It seems to us that such is not the law."

Where one of several parties has performed his part of a contract that he has been induced by others to enter into, on the consideration that they would perform the same services, or pay the same amount of money for a particular purpose, there is some reason for holding that a compliance with its terms may be enforced at the instance of the contracting party or the beneficiary; but whether this doctrine should be made to apply to mere agreements to give by two or more per-

sons to another a sum of money, without any special averment and proof that the promise by the one was the consideration of the promise by the other, is not by any means certain.

In this case there has been no performance by either party, and if one had paid the interest that payment would not preclude him from relying on the want of consideration as to the balance. Here all the parties whose names appear as obligees are pleading a want of consideration, and if the consideration expressed of love and affection is the only consideration, the obligation created no liability.

The mere acceptance by the trustee of the trust by which he was to make the investments when the proceeds came to his hands constituted no consideration. If it did, then every voluntary executory trust, where a trustee intervened, could be enforced. He has received nothing in the way of the trust fund, or gone to any trouble or expense other than the mere acceptance of the trust. Nor was the trust executed. A trust was created by naming the trustee, and agreeing to pay to him the note, the proceeds of which was to constitute the trust fund.

The fund has never been paid to the trustee, and the effort now is to compel its execution. The agreement to convey land in trust, as in the case of *Paulding*, without any other consideration than the affection for the collateral kinsman, will not be enforced, but when executed by a conveyance it becomes perfect and complete, and binding on all the parties unless assailed on some equitable ground. Nor will the chancellor deprive the obligors of the legal title to the land mortgaged, that the equitable lien of the trustee may be enforced in the absence of a valuable or meritorious consideration.

The land is simply held as in pledge for the payment of a note without any consideration, and while, under the ancient doctrine in reference to mortgages upon realty, where the legal title passed to the mortgagee and the equity only remained in the mortgagor, the mortgage might be foreclosed and the trust to that extent deemed executed under the later decisions of

this court, the equity only being with the mortgagee, it can not be well argued that the legal title holder will be deprived of his estate by reason of some intervening equity that has at best an undefined moral obligation to support it.

This class of cases have always been distinguished from obligations to charitable institutions where the donations are usually authorized by law, and an obligation imposed on the institution or the trustee to appropriate the fund for the purpose of carrying into effect the objects of the institution.

We have discussed this branch of the case at some length because counsel on each side have in their briefs, as well as in oral argument, rested their case mainly on the idea that the mutual promise in such a case was binding on all, and could be enforced, or that the mere payment of interest by one created a valuable consideration as to all, and as the case must go back, it is not only proper, but necessary, that the questions raised should be disposed of.

The obligation to pay the \$5,000 recites a consideration other than that of love and affection. The consideration expressed is "for value received and in consideration of love and affection."

The writing imports a valuable consideration, and the averments of the petition are in substance that the consideration was for value and for love and affection. What the consideration was is the subject of proof when the issue is properly made, and the demurrer should have been overruled and the appellees required to plead. The statement in the petition, that the object and effect of the trust was to secure to Mrs. Parker an annuity during life, does not exclude the idea that it was based on a valuable consideration.

The judgment sustaining the demurrer is reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

Wm. Lindsay and W. McKee Duncan for appellant.

Jas. S. Pirtle for appellees.

BANK OF LOUISVILLE v. GRAY, &c.

(Filed December 9, 1886.)

1. Separate estate—No particular form of words is necessary to create a separate estate in a married woman. It is only needful that an intention to vest the property in the wife to the exclusion of the husband shall clearly appear. Nor is it necessary where the wife's right to personal property is based upon a writing that the paper itself should show an intent to exclude the husband in order to create a separate estate in the wife. The intention may be shown by evidence aliunde the writing.

2. Trusts—While the mere raising of a trust for a married woman may not create a separate estate in her as to personalty, it is at least a circumstance tending strongly to show an intention to invest the wife with the exclusive use of the property.

In this case the wife's portion of the estate of a deceased brother was invested for her by a friend in certain shares of bank stock, and the certificate made out in the name of the husband as trustee for the wife. The husband was absent at the time, but upon his return approved the investment, and the dividends were received by the wife, the husband always recognizing the trust. Held—That the stock was the separate estate of the wife.

3. A married woman resident in Kentucky can not execute a power of attorney.

4. Principal and agent—A sale by an agent to himself of the property of the principal is void at the option of the principal, and one who purchases from the agent with notice of the facts holds as a trustee for the principal.

An agent to sell bank stock belonging to the principal had the stock transferred to himself on the books of the bank. The agent afterwards transferred the stock to the bank. Held—That the bank is not an innocent purchaser, and holds the stock as trustee for the principal.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

Lucy A. Gray, upon the death of her brother, became entitled to a portion of his estate. Her husband, George Gray, being absent, it was, on October 8, 1872, through her friend, invested in thirty-five shares of stock of the Bank of Louisville, and the certificate made out in the name of "George Gray, as trustee for Lucy A. Gray."

When the husband returned he approved the investment; and until January, 1875, the dividends were received by her, he always recognizing the trust.

The stock stood in his name as trustee upon the books of the

bank. At some time, not definitely shown, and without the knowledge of the wife, the husband pledged the stock to Thomas H. Hayes for a small loan; and thereafter the following power of attorney was executed, the wife being then a resident of Kentucky and signing it here:

“New York, January 2, 1874.

“Know all men by these presents, that I hereby constitute and appoint Thos. H. Hays my attorney in fact for the purpose of selling and transferring thirty-five shares of stock in the Bank of Louisville, in Kentucky, hereby ratifying and confirming all my said attorney may do in the premises. Witness my hand.

“GEORGE H. GRAY, Trustee,
“LUCY A GRAY.”

Upon January 18, 1875, Hays, claiming to have purchased the stock from the husband, had it transferred to himself upon the books of the bank; and on April 29, 1876, he, as the attorney in fact of Lucy A. Gray and her trustee, George Gray, transferred it for value to the bank.

This suit was brought on October 17, 1882, after demand, to compel the bank to account to the trustee for dividends upon the stock from the year 1874.

Three questions are presented: First, was the stock the separate estate of the wife? If not, it is manifest that the judgment for her can not be sustained.

If, however, it was, then, secondly, was the power of attorney valid as to her; and does the bank occupy such an attitude that it can insist upon its purchase?

Third. Under the facts proven, is she estopped from asserting the claim or barred by time?

Separate estate is the creature of modern equity. No particular form of words is necessary to its existence. It is only needful that an intention to invest the property in the wife to the exclusion of the husband shall clearly appear. It may be based upon a writing, or created by parol by a third party. In the case of a note executed to a married woman or in the pur-

chase of stocks, it may be shown by evidence aliunde the writing that the creation of a separate estate was intended; and this character need not be imparted to it by the writing which invests her with the right to it. The paper need not, in itself, show an intent to exclude the husband.

The case now presented is unlike that of *Petty v. Malier*, 14 B. M., 198, and some kindred Kentucky cases, where it was properly held that where a separate estate is claimed in land under a conveyance, it must be expressed in the deed, or the intention to create it therein shown.

It is urged, however, that the expression of the trust merely in the stock certificate, without expressing a separate use in the wife, did not create a separate, but merely a general trust estate; and that the husband could, at any time, assert his marital rights and convert the property.

If it be conceded that the mere raising of a trust for a married woman does not alone create a separate estate in her as to personalty, yet it is certainly one circumstance to be regarded in arriving at the intention of the parties, and whether one was in fact created. It is the usual, and was formerly the only, mode of creating one in personalty. It is not absolutely essential to it, because although by the common law a married woman can not hold the title to personal property acquired by her, but it flows through her into the husband, yet equity, intent upon justice, will treat him as a trustee for her as to it, and thus, if invoked, give her the beneficial use of it. The intervention of a trustee is, however, at least a circumstance tending strongly to show an intention to invest the wife with the exclusive use of the property. Unless so intended the trust is entirely at the mercy of the husband.

Here the trust for the wife was created. She, with the approval of her husband, intercepted the estate before it came to his hands, and by raising a trust, which was assented to and recognized by him, settled it upon herself as her separate estate. This was the intention of the parties, and in accordance with it she received the profits of it.

This character having been impressed upon it, the inquiry next arises whether she has in any way lost her right to it. A power of attorney is a writing of an executory character. At common law a married woman could not execute such a paper. It is essentially the act of one sui juris; and her right to do so, if it exists, must be found in the statute. Her right to convey is so derived, as indeed are all her powers. A conveyance by her must be made in conjunction with her husband, and upon privy examination. In the absence of these requisites she is not bound, because the statute has prescribed the particular mode in which she may do it.

There is no statute in this State giving a resident married woman the right to execute a power of attorney. In it she would not convey or acknowledge a conveyance or be privily examined. She is only authorized by the statute to convey upon privy examination; and the grant of power in this mode must be held to exclude any other. Our statute expressly provides that a nonresident married woman may convey any interest in any real or personal estate which she may own in Kentucky by an agent under a proper power of attorney; and this implies that the resident can not do it.

We are not to judge whether the absence of this power is the result of wisdom or not. We must construe the statute as we find it. Nor can we, in Turkish manner, decide, according to the hardship of the case, whether it be one way or the other. "Hard cases make shipwreck of the law."

It is proper, however, to say that the object in creating separate estates was not to enable the wife to dispose of her property; but to protect her against the dominion of her husband, and to enable her to keep it; and a proper policy perhaps dictates that the power to convey, which has been expressly given to her upon certain conditions, should not be delegated by her to others.

We conclude that the so-called power of attorney was, as to Mrs. Gray, void.

There is another reason, however, why it could not avail the-

bank. Hays transferred the stock to himself and then to the bank. It knew the character in which he was acting. The trust and his agency all appeared upon its books. It had notice. An agent can not sell to himself the property of his principal. He is not allowed to create such an antagonism. Such a sale is void at the option of the principal, and one who purchases from the agent with notice or knowledge of the facts holds as a trustee for the principal. The stock appears to have been first pledged to Hays by the husband; and Mrs. Gray is not shown to have received any benefit from the transfer. It is true that although Hays had already transferred the stock to himself upon the bank books, yet when he transferred it to the bank he did so as the attorney of the trustee and Mrs. Gray; but yet the certificate showed the trust, and the bank could easily have ascertained its nature and extent by an inquiry of Mrs. Gray. The act of Hayes was a tortious one; and while the bank doubtless acted in good faith, yet the circumstances were such as to charge it with such notice that it became its duty to inquire as to the nature and extent of the trust.

No innocent purchaser is involved, or any one holding under any commercial instrument; and the bank is not, therefore, so sheltered.

It does not appear that Mrs. Gray has done anything to estop her from now asserting her right; nor can the plea of limitation avail.

A bank is a trustee for its stockholders. Its transactions with them are to be closely scrutinized. Its possession is friendly. In this case, however, the bank as a purchaser took with notice of the trust, with knowledge that it was purchasing from an agent who had perverted his agency, and it does not appear that the cestui que trust had knowledge of the adverse claim of the bank until shortly before the bringing of this action. Under these circumstances the bank, standing in the attitude of a trustee for Mrs. Gray, can not be considered as having held adversely to her either as to the stock or the dividends. The latter, like deposits, are payable upon demand. They do not draw any interest until then; until de-

manded the bank holds them in trust for the stockholder; and until then time does not begin to run against the owner's right to them.

Judgment affirmed.

Hamilton Pope and Wm. Lindsay for appellant.

Woolley & Buckner for appellees.

MUNNELL v. OREAR, &c.

(Filed November 13, 1886.)

Sale by chancellor of married woman's real estate—While the chancellor may, in such an action as is provided for by section 491 of the Civil Code, order the sale of the life estate or remainder interest of a married woman in real estate, he has no power to sell the absolute estate of a married woman. She can divest herself of title only in the manner pointed out by the statute.

Husband and wife filed an equitable action against their children, asking for the sale of two tracts of land, in which they alleged the wife had a life estate, and the children the remainder. The exhibit filed shows that the wife had an absolute estate in one of the tracts of land. A sale was made under the chancellor's order, and the purchaser appeals from the order confirming the sale.

Held—That the title did not pass, but as the chancellor had jurisdiction to sell one of the tracts, and the proper proceedings were had therefor, the chancellor should give the plaintiffs an opportunity to execute to the purchaser a deed to the other tract, and, if they do so, should not disturb the sale.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Bennett.

The appellees, Columbus Orear and his wife, instituted an equitable action in the Montgomery Circuit Court against their three infant children, alleging that Mrs. Orear, the wife, and said three infant children, owned two tracts of land in said county, containing respectively sixty-three and twenty-four acres, Mrs. Orear owning a life estate therein, and the three children owning the remainder interest; that they owned said tracts of land as the devisees of Mrs. Orear's father. The appellees also allege that they are residents and citizens of the State of Missouri, and that said infant children are also residents of said State, and are under their care and control,

and that appellee, Columbus Orear, is the statutory guardian of said children, duly appointed in said State. They ask that said land be sold by the court, and its proceeds be invested in real property in the State of Missouri. The petition states facts, which are sufficiently proved, showing that the sale of said tracts of land, and the investment of the proceeds in land in the State of Missouri, will benefit all of the owners of said land.

The proceeding to sell said tracts of land is sought to be had under the 491st section of the Civil Code, which reads:

“In an equitable action by the owner of a particular estate of freehold in possession, or by his guardian or committee, if he be an infant or of unsound mind, against the owner of the reversion or remainder, though he be an infant or of unsound mind, and against the owner of the particular estate, if he be an infant or of unsound mind; or, if the remainder be contingent, against the person, if in being, in whom it would have vested if the contingency had happened before commencement of the action, though he be an infant or of unsound mind, and against the owner of the particular estate, if he be an infant or of unsound mind—real property may be sold for investment of the proceeds in other real property.”

The foregoing section certainly applies to married women, as well as to other persons, who may own the character of real estate therein mentioned. And the chancellor has the power to order such real estate so held, including the interest of married women, sold for the purposes mentioned in said section.

Besides, 6th subsection of section 494, makes it clear that section 491 refers to the interest of married women in the character of real estate therein mentioned.

The said infants, being sued as nonresidents, were properly brought before the court by constructive service, and were properly defended by a guardian ad litem duly appointed to defend for them.

The chancellor ordered the sale of said two tracts of land according to the prayer of the petition, and the appellant, at the commissioner's sale, became the purchaser thereof. There-

after the court, having overruled his objection to the sale, confirmed it. From the judgment of confirmation he has appealed to this court.

The allegations of the petition were sufficiently sustained by the proof and exhibits filed, except in this: The exhibits filed show that the sixty-three acre tract of land was owned by Mrs. Orear in her own right in fee simple. It is probable that the deeds which convey to her this tract of land in fee were thus made by a mistake, but, be that as it may, the absolute title is in her.

Under the section of the Civil Code *supra* the chancellor has no power to sell the absolute estate of a married woman. Under said section her life estate or remainder interest only can be sold, together with the interests of others in the same estate for the purposes mentioned in that section. "The chancellor has no inherent power to decree the sale of the real estate of married women. When his intervention is invoked to sell the lands of persons under legal disability power for that purpose must be looked for in the statutes, and if none be found, he can not adjudge a sale." (*Henning v. Harrison, &c.*, 13 Bush, 723.)

Therefore, the decree of the chancellor ordering a sale of said tract of land did not divest Mrs. Orear of her title. She can divest herself of her title only in the manner pointed out by the statute.

The judgment confirming the sale as to both tracts of land is reversed.

But as the lower court had jurisdiction to sell the twenty-four acre tract of land, and as the proper proceedings were had to sell it, and the law fully complied with in procuring the decree of sale, etc., and as the appellees, Columbus Orear and wife, by a deed of conveyance duly made and acknowledged according to the statute, can pass a good title to said sixty-three acres of land to the appellant, which, together with the commissioner's deed to the twenty-four acre tract of land to appellant, would give him a perfect title to the whole, there-

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fore, the lower court, before setting aside the order confirming said the order confirming said sale, will give Columbus Orear and his wife a reasonable time in which to tender in court a deed to appellant, properly signed and acknowledged by them, to said land, and if such deed should be tendered the sale should be permitted to stand confirmed, otherwise the sale must be set aside in toto, and the appellant released from his purchase.

Cornelison & Mitchell for appellant.

Young & White for appellee.

SMITH, &c. v. THE WESTERN UNION TELEGRAPH CO.

SAME v. SAME.

(Filed January 6, 1887.)

1. "Bucket shops"—The device known as a "bucket shop," which purports to be an actual deal in grain, but is in fact merely a wager on the market price of the commodity at some specified time in the future, is a species of gambling, and, therefore, illegal and contrary to public policy.

2. Telegraphs—A telegraph company can not be required to communicate a message which is to furnish the means of carrying on an illegal business, whatever its motive in refusing to communicate the message. In this case the court refuses to require appellee to continue to furnish the appellant, the keeper of a "bucket shop," with the market quotations.

3. Pleading—Defendant having denied that plaintiff was a merchant, or that he was engaged in the grain business, under that denial it was competent to show that appellant was not a dealer in grain, but simply a gambler therein.

Appeals from Louisville Chancery Court.

Opinion of the court by Judge Bennett.

The appellant brought suit in the Louisville Chancery Court against the appellee, in which he alleged in substance that he was the owner and proprietor of the Louisville Cotton, Stock and Provision Exchange; that he was a merchant, and his business consisted in the buying and selling of grain, provisions and other merchandise; that in order to enable him to carry on his business successfully, and to compete with other persons engaged in similar business, it was absolutely necessary that he should be promptly and constantly informed of the

prices of such commodities in the leading markets of Chicago and New York; that the appellee had, for many years past, combined with its regular business of telegraphing messages for the benefit of the public, the business of collecting the market reports in the leading business centers of this country; that the principal market for grain and provisions was the Chicago Board of Trade; that the appellee had, by a contract, collected said reports and delivered and distributed them from the main office of the appellee to the respective offices of its customers by means of its wires and a printing machines called a "ticker;" that, by contract, appellant, as one of appellee's customers, was entitled to the prompt delivery at his business office, by means of said wires and ticker, of all reports of the market prices of grain, provisions, etc., from the Chicago Board of Trade and other leading business centers, as received by appellee over its wires; that appellee, as such dealer for the benefit of the public, had no right to refuse to furnish the appellant with said reports, the appellant paying a fair compensation therefor, nor to discriminate against appellant in favor of other customers engaged in similar business; that appellee threatened to cease to furnish appellant with said reports, and to deprive him of the use of said ticker unless he would sign a contract agreeing to give appellee all of his message business at regular message rates; that appellant refused to sign said contract with said clause in it because the same was illegal.

The lower court, in accordance with the prayer of appellant's petition, granted a temporary injunction restraining the appellee from stopping the supply of said reports to the appellant, and from removing said ticker.

By the appellee's answer and amended answer it denied that appellant was a merchant, or that his business consisted in buying or selling grain, provisions or other merchandise; or that it was then under a contract with the appellant to continue to allow him the use of said ticker, or to furnish him thereby with all market reports.

The evidence tends strongly to show that the appellant, at

the time complained of, was not a grain and provision merchant, but was the keeper of a bucket shop, which is described as a place where the prices of grain, provisions, etc., are posted on blackboards as they come in on the ticker. The shop buys or sells indifferently, and always at the price appearing for the time being on the blackboard. Should a customer wish to make a deal in June wheat—say buy one thousand bushels—he sees the last quotation—say \$1 per bushel—he gives the shop the margin—say one cent on the bushel or \$10. The shop charges a fixed commission—say one quarter of a cent per bushel. The shop does not notify the customer of the fluctuations of the market, but he looks out for that on the blackboard. Wheat on the next quotation goes down—say three-quarters of a cent—this loss of three-quarters of a cent added to one-quarter of a cent charged for commission makes one cent per bushel on one thousand bushels, or \$10. This exhausts or “freezes” out the margin. The deal is closed and the shop has made \$10.

On the other hand, should wheat advance one cent per bushel the customer would make one cent per bushel, less one-quarter of a cent per bushel, the commission, and the shop would lose three-quarters of a cent per bushel.

It is understood between the customer and the shop that there is no actual deal in grain—that there is none to be delivered—but that the difference in future prices is simply dealt in. In other words, the customer bets the shop that on a certain day in the future, or in a certain month in the future, wheat will be worth so much, and if, at the time agreed, the wheat is worth that much, the customer wins, less the commission; if it is not worth that much the shop wins. The quotations are used as a basis of this species of betting as a gambler uses dice to decide the bet.

We are satisfied from the proof in the case that appellant was engaged in this kind of business; and that the contract with the appellee, by which appellant was furnished with the market reports and the use of the “ticker,” was necessary to enable him to carry on the business.

As we have just said, in this kind of business nothing is actually bought or sold. Nor do the parties intend an actual sale of the commodity which they pretend to deal in. They merely wager on the market price of the commodity at some specified time in the future. A mere statement of the character of business done by appellant shows it to be a species of gambling as well defined and as reprehensible as that of keeping a faro bank or a dice machine, and is, therefore, illegal, and contrary to public policy.

The question then is, can the appellee avail itself of the fact that appellant was engaged in an illegal business as an excuse for withholding the market reports from him and withdrawing the ticker, both of which were used by appellant in carrying on said business.

Says Justice Shaw, in the case of *Fuller v. Dame*, 18 Pick., 481: "The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do, or cause the doing, of unlawful acts; it avoids contracts and promises made with a view to place one under wrong influences; those which offer him a temptation to do that which may injuriously affect the rights or interests of third persons."

• Justice Grier, in the case of *Marshall v. The Baltimore & Ohio R. R. Co.*, 16 Howard, 334, says: "It is an undoubted principle of the common law that it will not lend its aid to enforce a contract to do an act that is illegal, or which is inconsistent with sound morals or public policy, or which tends to corrupt or contaminate, by improper influences, the integrity of our social or political institutions."

In *Watson v. Fletcher*, 7 Gratt., 1, it is held that when gaming or wagering is illegal under the statute or common law, the illegality will extend to all antecedent contracts made in aid of or to effectuate the illegal purpose.

These reports were the essence, the very sinew, of appellant's gambling business, and without the prompt supply of which his business was a failure. Can the appellee be compelled to continue the supply? We think not. Not upon the ground that

the appellee is the innocent victim of an illegal enterprise; not that it has been entrapped into aiding a gambling business, for it says that it was willing to furnish the reports as long as the terms of the contract suited it, but upon the ground that appellant was engaged in a gambling enterprise, which is contrary to law, good morals and public policy. It is for the sake of the law and the best interest of society that we relieve the appellee from continuing to furnish to appellant the reports.

It is contended that, although the appellant may be engaged in a gambling business, the appellee has no right to withhold the reports from him because of its position as a public servant, bound to serve the public indiscriminately, and without questioning the motives or the purposes of the persons who employ it.

Mr. Gray, in his work on Communication by Telegraph, section 15, says: "The general rule is that a telegraph company is under no obligation to contract to communicate an illegal or an immoral message."

This rule is not only correct as to telegraph companies, but it applies to all persons who undertake to carry for the public. A contrary rule would convert a telegraph company into a public vehicle for the purpose of communicating unlawful, treasonable or felonious schemes of all kinds, or the consummation of any and all kinds of illegal transactions and enterprises. Of course a telegraph company, in assuming to refuse to send a message because it is illegal or immoral, acts upon its peril. If it is mistaken, or has misjudged the tenor or purpose of the message, it will be held responsible to the injured party for any damage sustained by reason of the refusal.

It is contended that inasmuch as the appellee failed to plead that appellant was engaged in an illegal business, that question can not be considered.

The appellee did deny that appellant was a merchant, or that he was engaged in the grain business. Under that denia

it was competent for the appellee to show that appellant was not a dealer in grain, but simply a gambler therein.

The judgment of the lower court dissolving the injunction and dismissing the petition is affirmed.

Emmet Field for appellant.

Rozel Weisinger for appellee.

GUDGELL v. BATH COUNTY COURT.

(Filed October 21, 1880—Not to be reported.)

A county attorney may appeal to the circuit court from an order of the court of claims rejecting his claim for a "reasonable salary," although he did not ask any specific amount, but simply a reasonable allowance. If, however, upon the trial in the circuit court the proof should show a reasonable sum to be less than \$20, then a dismissal of the appeal would be proper.

(This case is reported in abstract in 1 Ky. Law Rep., 336.)

Appeal from Bath Common Pleas Court.

Opinion of the court by Judge Hargis.

"He (the county attorney) shall be allowed annually, at the court of claims, a reasonable salary out of the county levy." (Section 8, article 3, chapter 5, General Statutes.)

This is the provision for the payment of county attorneys for their official services. The law has fixed the fact that the attorney shall have an annual salary, but as to the amount thereof the court of claims is the judge, governed by the requirement that the sum shall be reasonable. That court has no discretion about the matter, except as to the amount, and that limited within reasonable bounds.

The court of claims, on motion of appellant for a reasonable salary out of the county levy for one year's services as county attorney, allowed him the sum of \$150, to which he objected and excepted, and prosecuted an appeal to the Bath Court of Common Pleas, which court dismissed his appeal because he had not demanded from the court of claims a specific sum or amount for his salary.

By section 11, article 3, chapter 27, General Statutes, it is

provided that any person presenting a claim for allowance before a county court of levy and claims for \$20 or upwards, shall have the right to appeal to the circuit court from the judgment or order of said court rejecting said claim or any part thereof, as appeals are now taken from judgments of the quarterly court.

This law authorizes the circuit court (the common pleas court having the same jurisdiction) to hear the case de novo on appeal. It seems to us that the spirit and intent of the statute *supra* is that where the law directs that a reasonable sum shall be allowed as a salary to a public officer for his official services, the presentation of such claim, with the facts showing it to be of the class provided for by law, and asking the court to make the reasonable allowance, without fixing the amount in the claim, is sufficient to authorize an appeal; provided the service so claimed to have been rendered is in value \$20 or upwards.

There is no difficulty in ascertaining the fact whether the services constituting the claim were of the value of \$20 or upwards. If the proof should show that a reasonable sum was less than \$20, or the sum allowed, then a dismissal of the appeal would be proper.

Wherefore, the judgment is reversed and cause remanded for further proceedings not inconsistent with this opinion.

Chief Justice Cofer dissenting.

R. & W. S. Gudgell for appellant.

J. S. Hurt for appellee.

STATE BOARD OF PHARMACY OF KENTUCKY v.
WHITE.

(Filed December 15, 1886.)

1. Under the "Pharmacy Act" of this State all "graduates in pharmacy" are entitled to be entered as registered pharmacists without submitting to an examination and without having served an apprenticeship, and any rule of the State Board of Pharmacy to the contrary is void.

2. "Graduates of pharmacy"—A graduate of a "school of pharmacy," which is one of the departments of an advanced institution of learning,

whether in this State or not, such as the University of Michigan, is a graduate of a "college of pharmacy" within the meaning of the "Pharmacy Act."

3. Graduation as a "pharmaceutical chemist" confers the honor of a "graduate in pharmacy."

4. Mandamus will lie to compel the State Board of Pharmacy to enter a "graduate in pharmacy" as a registered pharmacist, the board having no discretion in the matter.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Judge Holt.

Bessie W. White, of Kentucky, is a graduate of the School of Pharmacy of the Michigan University, her diploma as "a pharmaceutical chemist" being dated June 28, 1883.

The university is regularly incorporated. She applied to the Kentucky State Board of Pharmacy, on November 8, 1883, for registration as a registered assistant pharmacist, paid the required fee, exhibited her diploma, and even offered to be examined. They rejected her application upon the ground that she was not a graduate of pharmacy within the meaning of the law; and refused to examine her. Thereupon she, by this suit, applied for a mandamus to compel the board to admit her to registration.

The Pharmacy Act (General Statutes, page 993), provides:

"Section 1. It shall be unlawful for any person, unless a registered pharmacist, or registered assistant pharmacist, in the employ of a registered pharmacist, or unless acting as an aid under the immediate supervision of a registered pharmacist, or a registered assistant pharmacist, within the meaning of this act, to retail, compound or dispense medicines or poisons except as hereinafter provided.

"Section 2. Any person, in order to be a registered pharmacist or a registered assistant pharmacist in the meaning of this act, shall be either a graduate in pharmacy, a practicing pharmacist, or a practicing assistant in pharmacy.

"Graduates in pharmacy shall be such as have obtained a diploma from a regular incorporated college of pharmacy. Practicing pharmacists shall be such persons as, at or prior to

the passage of this act, have kept or continue to keep open shops for compounding and dispensing the prescriptions of medical practitioners, and for the retailing of drugs and medicines, and who shall have declared their intention in writing of keeping open shops for a compounding of prescriptions of medical practitioners, and the retailing of drugs and medicines, and such other persons who, after the passage of this act, shall have declared their intention, in writing, to open a shop for compounding and dispensing the prescriptions of medical practitioners, and for retailing drugs and medicines, shall have at least three years of practical experience in the business, and shall have passed a satisfactory examination before the State Board of Pharmacy.

“Practicing assistants in pharmacy shall be such persons as shall have served five years immediately preceding the passage of this act in a shop or shops where the prescriptions of medical practitioners are compounded, and such other persons as have served three years’ apprenticeship in a shop or shops where the prescriptions of medical practitioners are compounded; have furnished a certificate of sober habits and good moral character from the county judge of the county in which he resides, and shall have passed a satisfactory examination before the State Board of Pharmacy. * * *

“Section 4. * * * Said board shall * * * have power to make by-laws and all necessary regulations for the proper fulfilment of their duties under this act. * * * The duties of said board shall be to examine all applicants for registration, to direct the registration by the registers of all persons properly qualified or entitled thereto, and to report to each regular session of the general assembly on the condition of pharmacy, together with the names of all registered pharmacists and assistant pharmacists.”

We have cited so much of the act as is material to the consideration of the questions involved in this case.

The second section enumerates the qualifications for registration in pharmacy. It recognizes two classes of persons

under the title of practicing pharmacists who are entitled to be entered as registered pharmacists:

1st. All persons actually in the business of pharmacy at the time of the passage of the act, and who may declare their intention in writing to continue in it.

2d. All persons not then in the business, but who may declare their intention, in writing, of going into it, provided they "shall have at least three years of practical experience in the business, and who shall have passed a satisfactory examination before the State Board of Pharmacy."

Persons of the first class are not required to submit to an examination as to their experience or qualifications.

The same section provides in substance, first, that all persons shall be entitled to be registered as practicing assistant pharmacists, without an examination, who have had five years' experience immediately preceding the passage of the act; and, second, those who have served a three years' apprenticeship in the business, and pass a satisfactory examination.

It is equally clear that all graduates in pharmacy shall be entered as registered assistant pharmacists.

The board has no right to inquire into the qualifications of two classes of persons who may apply for registration: First, those who were actually engaged in the business at the time of the passage of the act; and, second, graduates in pharmacy. It can not reasonably be supposed that the legislature intended to enact a law requiring persons, who had then been in a business for perhaps the greater portion of a life, to pass a satisfactory examination as to it before a board of examiners, or else abandon it; and it is clear from the language of the act that if an examination is not required of this class, that then graduates in pharmacy of an incorporated college are also entitled to be registered without submitting to it. The second section expressly says what classes of persons shall be examined—*expressio unius est exclusio alterius*—and the provision in the fourth section, that it shall be the duty of the board to examine all applicants, must be held to refer to all those whom the

act has already provided shall be examined; and this view is confirmed by the fact that there is immediately coupled with the provision the further one, that the board shall "direct the registration by the register of all persons properly qualified or entitled thereto."

If this construction be incorrect, then all of the second section relating to an examination is surplusage, as well as the words "or entitled thereto," in the fourth section.

It is urged that the act was intended as a police measure for the protection of the public from incompetent druggists, and that, therefore, it should be construed so as to require all applicants to be examined. Certainly this was its object, and, beyond question, the law is a salutary one; but until a comparatively late period there was no law whatever upon the subject in this State, and the business, like any other, was left to regulate itself. In some of the States the legislatures have refused to legislate upon the subject; and in view of legislative history upon the subject it is reasonable to presume that our legislature concluded that it was a sufficient step in advance to require an examination of all persons, save those then in the business and graduates of incorporated colleges of pharmacy. It does not exempt the graduates of colleges of pharmacy generally, but only such as are incorporated and under the ægis of the law.

It follows that any rule of the board forbidding the registration of any one who had not served an apprenticeship with an apothecary is invalid as to those engaged in the business when the law was enacted, and as to the graduates of incorporated colleges of pharmacy. The corporation exists by virtue of the legislative act. It draws its breath from it; and any rule or act in violation of it is ultra vires and void.

If the performance of an act rests in the discretion of the person or body of whom performance is required, mandamus will not lie. If judgment is to be exercised, or the act be of a judicial character, depending upon the discretion of the power who may perform it, then a court will not interfere by means

of this writ, which ought not to issue except where the right is clear. Even a judge, however, may be compelled by it to act. Thus he may be required to pass upon a bill of exceptions, but not in a particular way. The direction the judgment may take can not be controlled, and thus produce a particular result. In this instance, however, a plain duty was to be performed, provided the applicant was a graduate in pharmacy of an incorporated college of pharmacy. If so, the board had no discretion in the matter. It was simply their duty to direct the registration; and in such a case the writ will lie.

In our opinion the term "graduates," as used in the act, should not be restricted to the graduates of an incorporated college of pharmacy of this State. If the legislature had so intended, we think they would have said so. Moreover, this is not probable, owing to the scarcity of such colleges in this State. This brings us to the consideration of the question whether the appellee is a graduate in pharmacy of an incorporated college of pharmacy.

Scientific authorities appear to agree that the term "pharmaceutical chemist" embraces that of pharmacist. The latter is one who possesses the knowledge and skill necessary to compound and dispense medicines; while the former, in addition to such knowledge and skill, is also able to analyze them and detect any adulteration. The knowledge of analytical chemistry is added to that necessary to a dispensing pharmacist; and as the one necessarily includes the other, the graduation of the appellee as a "pharmaceutical chemist" necessarily conferred the honor of "a graduate in pharmacy."

It is, however, urged that she is the graduate of a school of pharmacy, and not a college of pharmacy. The term "school" is a generic one. In its broad sense it includes all educational institutions. Generally speaking, school and college are convertible terms. It is correct to speak of any educational institution as "a school." In both England and France the institutions in which pharmacists receive their final education are termed "schools;" and the colleges in pharmacy of this

country are so termed by the United States Commissioner of Education.

Really, however, whether any particular school is a college or not, depends upon the facts of the particular case. It may ambitiously so style itself, and not be such.

Here, however, is an institution stamped as a university or college by law. Its curriculum shows it to be one of high order; and its reputation so stamps it.

Its "school of pharmacy" is merely one of its departments; and when the term is thus applied in an advanced institution of learning, it and the term "college" are convertible into each other.

The officers of this college confer the degree of pharmacy or "pharmaceutical chemist," and it may as well be said that a graduate of the School of Mines of Columbia College, or of the Sheffield Scientific School of Yale, or of the Dane Law School of Harvard, is not a graduate of those colleges respectively, as to say that a graduate of the School of Pharmacy of the University of Michigan is not a graduate of the latter institution.

"Schools of pharmacy" are connected with and so termed by the Vanderbilt University; also that of Virginia, Iowa and Louisiana, institutions ranking as high as any in the land, and surely their graduates in pharmacy are those of colleges of pharmacy.

The School of Pharmacy of the Michigan University, as indeed do all such schools of a like grade, instructs its graduates not only in the theory, but the practical part of the business. They may not be qualified to conduct the merely mercantile part of it to a successful issue, but they are educated both theoretically and practically in all that affects the safety and health of the public.

It is gratifying to see American women coming to the front in these honorable pursuits. The history of civilization in every country shows that it has merely kept pace with the advancement of its women.

The Brahmin's wife was burnt with his dead body. The

Mohammedan woman is a slave for the man. The husband of the English wife formerly had a right to chastise her; and by a fiction of law her legal identity was completely absorbed in him. We are leaving mockeries behind us; and it is gratifying that these matters are now a long ways in the past.

Judgment affirmed.

Goodloe & Roberts and Baker & Atchison for appellant.

Chenault & Colston for appellee.

KENTUCKY SUPERIOR COURT.

CORUM, &c. v. CATLETTSBURG NATIONAL BANK.

(Filed February 2, 1887.)

Separate estate—A married woman conducted a boarding house in a building owned by the husband, or under his control, the personal property used in the business also belonging to him. With the profits of that business the wife purchased a piano, and the husband's creditors attempting to subject it to his debts, she claims it as her separate estate.

Held—That the husband's creditors may subject the property. A separate estate in the profits of such a business can not be created merely by the consent of the husband to the prejudice of his creditors.

Appeal from Greenup Circuit Court.

Opinion of the court by Presiding Judge Bowden.

In *Urige v. Horstman*, 8 Bush, 172, decided in 1871, it was held that statutes, as they then existed, defined and fixed all the rights a married woman could have in her personal earnings as against the claims of her husband's creditors. Those statutes were section 4, article 2, chapter 47 of the Revised Statutes, now substantially embraced in section 5, article 2, chapter 52 of the General Statutes; and the act of February 14, 1866, now section 6 of that article. The act of April 11, 1878, applies to wages and compensation for service or labor done by the wife for an employer, and manifestly does not contemplate earnings in a business carried on by the wife.

The money with which the piano was purchased was earned

by Mrs. Corum in conducting a boarding house, kept (as we infer) in a building owned by the husband, or at least under his control. It may be also assumed that the personal property used in the business belonged to him, as that is the presumption and there is no allegation to the contrary.

In *Urig v. Horstman*, and subsequently in *Penn v. Young*, 10 Bush, 626, it was held that a separate estate in the profit of a business like that can not be created by the consent of the husband, to the prejudice of his creditors. If that result is desired she must be enfranchised by a proper judgment in equity under the statute unless the case provided for by the other statute exists.

None of the cases cited by her counsel hold otherwise. A separate estate out of her earnings, or out of any other property the husband owns may be created by his consent so as to be valid against him or his heirs or representative unless in the latter case it should be held that a personal representative may dispute it in his capacity of trustee for creditors. In *Thomas v. Harkness and wife*, 13 Bush, 23, the rights of creditors of the first husband, who gave the property, were not involved; nor were they in *Maraman's Adm'r v. Maraman*, 4 Met., 84. In *Galbreath v. Campbell*, 12 Bush, 459, the wife's property, owned by her before her marriage, had not been reduced to possession by the husband; and the amount involved being such as she could have had settled on her by a court, it was held that the voluntary settlement of it on her by the husband should be sustained. In *White v. Sale*, 7 Ky. Law Rep., 570, the property was bequeathed to the wife, and had not come to the husband's possession. In *Jackson v. Reynolds*, 7 Ky. Law Rep., 98, the wife had been empowered by a judgment to act as a feme sole.

The judgment is affirmed.

W. C. Ireland for appellants.

L. T. Moore for appellee.

COURT OF APPEALS ABSTRACTS.

RITTER v. BELL, &c.

Filed January 20, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Bennett, affirming.

An officer's certificate can not be called in question except in a direct proceeding against him or his sureties, or except in an action against the party benefited thereby, upon the allegation of fraud on the part of such party, or a mistake on the part of the officer.

Appellant instituted this action to recover dower in land, she having united with her husband in a conveyance of the land in which she relinquished dower, the officer's certificate showing that the deed was properly acknowledged by her. She does not allege mistake on the part of the officer, or fraud on the part of the grantee, and does not, in express terms, allege fraud on the part of her husband. It is alleged and proved that on the day the conveyance was acknowledged the grantee and his wife came to her house about the same time the clerk came to take the acknowledgment, the clerk having been sent for a short time before, and appellant relies upon these facts to show that a conspiracy was formed to force her to sign and acknowledge the paper. It appears that appellant believed that if she did not sign the writing she would be returned to the lunatic asylum, from which she had been taken, but that she finally signed the deed upon condition that her husband would do certain things he promised to do.

Held—That the motive that finally controlled the appellant was the promises made by her husband, and not the fear that she would be returned to the asylum, and no improper conduct upon the part of the grantee being shown the relief asked can not be granted.

John Feland for appellant.

H. A. Phelps & Son for appellees.

CITY OF HENDERSON v. SNEED.

Filed January 22, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Judge Lewis, affirming.

City bonds—Taxation—Construction of statutes—Under an act passed by the legislature in 1869 the city of Henderson issued "school bonds" to a large amount. In 1878 an act was passed authorizing the city to issue "funding bonds," to be exchanged for the outstanding bonds of the city. Each of these acts provided for the taxation of real and personal estate to pay the interest on the bonds to be issued under its provisions, with the proviso in each case that estate listed under the equalization law should not be taxed therefor. In 1880 an act was passed amending the act of 1869 by striking out this proviso in that act. All of the school bonds issued under the act of

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1869 have been exchanged for "funding bonds" issued under the act of 1878. Held—That the amendatory act of 1880 applied only to the bonds issued under the act of 1869 which had not then been exchanged for "funding bonds," but all the bonds of 1869 having now been so exchanged, the act of 1880 is obsolete; it can not be made to apply to the "funding bonds."

Sol. S. Sizemore for appellant.

Yeaman & Lockett for appellee.

WALTERS v. DAVIS.

Filed January 27, 1887. Appeal from Hart Circuit Court. Opinion of the court by Judge Holt, reversing.

1. Mortgage—Homestead—Although the wife unites with her husband in a mortgage and properly acknowledges it, if the acknowledgment is before a deputy clerk, and the clerk in writing out the certificate fails to include in it the deputy's memorandum of acknowledgment, the homestead does not pass. In this case, however, the husband being dead, the chancellor should have subjected the homestead subject to the right of occupancy of the widow and children.

2. Correction of certificate—Where it is alleged that the clerk by mistake failed to include in his certificate the deputy's memorandum of acknowledgment, the mistake may be corrected, provided the mistake appears upon the instrument itself. Whether upon the return of this case an amended petition setting up such a mistake should, if offered, be permitted to be filed must rest in the sound discretion of the chancellor under all the attending circumstances.

3. Evidence—Where a party has testified for himself concerning a transaction with a decedent, the adverse party may testify as to the same transaction.

Isaac T. Woodson and W. J. Macy for appellant.

LOCHRANE v. STEWART.

Filed January 27, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Chief Justice Pryor, affirming.

Attorney and client—Contract—S. and others having formed a partnership for the purpose of managing and operating a lottery, entered into a written contract with two attorneys, who were not partners, employing them as special counsel "for said firm," and agreeing to pay them \$500 per month "during the existence or operation of said lottery," the contract reciting that it was in consideration of the services of said attorneys "in bringing about and consummating the arrangement of business interests between said parties and the services to be performed by them in the protection of said business." After thirteen months the firm was dissolved, and appellant, one of the attorneys, having been paid at the rate agreed for the thirteen months, was notified that his services were dispensed with. S. then formed a partnership with others, and continued the operation of the lottery until his death. Appellant now brings this action against appellee, the wife of S., who, as executrix and devisee of S., has been running the lottery

since his death, to recover \$500 per month from the time of the dissolution of the first firm up to the commencement of this action.

Held—That under appellant's contract the relation of attorney and client existed as long as the firm with which the contract was made continued to exist, but no longer.

Hargis & Eastin and S. B. Toney for appellant.

Muir & Heyman, Woolley & Buckner and W. O. & J. L. Dodd for appellee.

GRUNDY v. LOUISVILLE & NASHVILLE R. R. CO.

Filed January 27, 1887. Appeal from Fayette Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Railroads—Presumption of negligence overcome—In an action against a railroad company for the killing of stock the case should go to the jury if the witnesses for the defendant are contradicted or impeached, or the testimony is of a conflicting character, but the uncontradicted and unimpeached testimony of the employes of the company, showing that there was no negligence, rebuts the statutory presumption, and the verdict must be for the company. Therefore, although the instructions in this case are open to objection, the verdict for the defendant will not be disturbed, the uncontradicted and unimpeached testimony of the employes showing that the killing of the stock was unavoidable.

2. Failure to use air brakes—The fact that there were no air brakes on the train by which the stock was killed is not sufficient to charge the company with the loss.

Parker & Warfield for appellant.

Hunt & Darnall for appellee.

MILES v. SAUNDERS.

Filed January 25, 1887. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Holt, affirming.

Reversible error—Unless it is apparent at first blush that the verdict of a jury is flagrantly against the evidence, it can not be disturbed, no other question than the sufficiency of the evidence to support the verdict being presented.

Wright & McElroy for appellant.

P. F. Edwards for appellee.

JOHNS, &c. v. McCULLOUGH, &c.

Filed January 29, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Holt, affirming.

Ejectment—Verdict and judgment—In this action of ejectment the petition describes the land by natural objects and adjoining lands. Pending the action a survey was made under an order of the court and filed, but it does not appear in the record. The verdict of the jury found "for the plaintiff the land described in the pleadings." The judgment rendered upon the verdict describes the lands by metes and bounds, and, therefore, more specifically than it is described in the pleadings.

Held—That the verdict was sufficiently certain as it was susceptible of certainty by reference to the record, and the judgment was proper, as it

must be presumed that the description of the land was obtained from the survey filed.

C. H. Lee for appellants.

John H. Fryer for appellees.

FIRST NATIONAL BANK v. THOMAS.

Filed February 3, 1887. Appeal from Logan Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Limitation—An action upon a bill of exchange is barred after five years from the accrual of the cause of action.

2. Mortgage—When a debt is barred by limitation a mortgage executed to secure it is also barred.

3. Limitation—The execution of a mortgage by the drawer of a bill of exchange, to secure its payment, does not extend the period limited for the bringing of an action against the drawer from five to fifteen years.

4. Conflict of laws—The defendant having pleaded the statute of limitations of this State, under which the action to enforce the mortgage lien is barred, the plaintiff claiming that the statute of Ohio applies, the burden is on it to show that the cause of action accrued in Ohio; that the parties are citizens of that State, and that the law of limitation in that State is no obstacle to the recovery.

Robert Rodes and Theo. B. Blakey for appellant.

Browder & Edwards for appellee.

WHITTAKER v. LINDLEY.

Filed February 3, 1887. Appeal from McLean Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

Dower in Mines—Whether or not dower may be had in mines that have not been opened, it is well settled that as to mines that have been opened the widow is entitled to dower. In this case land was allotted to the widow as dower under which a mine was operated, with an entrance upon the lands of another, but the mine was not valued as a mine in allotting dower.

Held—That while the widow will not be allowed to go upon the land of another to reach the entrance to the mine she may operate the mine by making an entrance on the dower tract, and may take therefrom so much of the coal as may be necessary for the use of the farm as fuel, and may sell so much as may be required to keep the dower tract in repair.

Charles Eaves for appellant.

J. C. Jonson for appellee.

HOWARD v. WHITT, &c.

Filed February 3, 1887. Appeal from Elliott Circuit Court. Opinion of the court by Judge Lewis, affirming.

Judicial sales—Agreement to allow redemption—Where one purchases land at judicial sale, under an agreement to allow the owner to redeem, he should be regarded as holding the land in trust for the owner, and an action by the owner to be permitted to redeem the land in pursuance of the alleged agreement is not an action to charge the purchaser upon a contract for the sale of real estate within the meaning of section 1, chapter 22, General Statutes.

W. sold to M., and signed the notes for the purchase money to H., who

brought suit to enforce his lien, and at the sale became the purchaser for the amount of his judgment. At the time of the sale W. had repurchased the land from one to whom M. had sold, and was in possession. W. now seeks to be permitted to redeem by paying the amount of the judgment, alleging that such was the agreement H. made with him, and that H. has accepted part payment of the amount. H. denies the agreement, and also acceptance of part payment. H. was entitled under orders of court, made in 1870, to a deed, and also a writ of possession, but never had a deed made until June, 1882, and never set up claim to the land until November, 1883, when he filed his petition to be made a party to this action brought by W. to recover the purchase price of a person to whom he had sold, and to enforce his lien. Held—That it is impossible to account for the long acquiescence by H. in the possession and enjoyment of the land by W. except upon the theory that he agreed to permit a redemption, and received part consideration therefor. W. was, therefore, properly permitted to redeem.

J. R. Botts and M. M. Redwine for appellant.

J. B. Hannah for appellees..

BOWMAN v. SPALDING.

Filed February 5, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Holt, affirming.

1. Partnership—Trust—Limitation—S. sold to H. his interest in the firm of L. & Co., and by an agreement among all the parties the notes owing to the old firm were turned over to the new firm, but were to be used as far as necessary in paying the debts of the old firm, which were assumed by the new firm, and S. was to be saved harmless from them. S. having been compelled to take up a debt owing by the old firm, now seeks to have it paid in full out of a fund in court which is the proceeds of the notes turned over by the old firm to the new one, and to his claim limitation is pleaded. Held—That the arrangement between the parties placed the debts due the old firm in the hands of the new one in trust to pay the debts of the old firm, and being an express trust, based upon the agreement of the parties, the defense of limitation is not available.

2. Partnership creditors have no primary lien upon the partnership assets for the payment of their claims, but must work out an equity through the partner; and if one of two partners sell his interest in the partnership to his co-partner, his lien upon the partnership property to have the partnership debts paid out of it is gone, as there is no partnership property left. But no such case is here presented.

John D. Wickliffe for appellant.

J. W. Thomas for appellee.

REIDHAR v. PFEIFFER.

Filed February 5, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Lewis, affirming.

In pleading a discharge in bankruptcy as a defense to an action it is not necessary to state that the court granting the discharge had jurisdiction, or to state facts showing it had jurisdiction. The jurisdiction of the United

States courts is regulated by laws of congress, of which all State courts take judicial notice.

Goodloe & Roberts for appellant.

Elliott & Hemingway for appellee.

MALONE v. MARTIN.

Filed February 5, 1887. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Holt, reversing.

1. Co-tenants—Adverse possession—In this action to recover the undivided half of a tract of land, one of the grounds upon which the recovery is resisted is that the plaintiff many years ago surrendered his interest in the land to his co-tenant who has since held it adversely. Held—That this defense is not available, as there was no writing between the parties as to any such transfer of interest. Moreover, as they were joint owners, the possession of one was the possession of both.

2. Bankruptcy—A bankrupt failed to name in his petition and schedule his interest in a certain tract of land, and hence the assignee never took charge of it. This action was brought by the bankrupt more than two years after his discharge and the final disposition of the case in bankruptcy to recover the land of one in possession. Held—That the entire estate of the bankrupt passed to his assignee by the transfer of the register, and, therefore, the land in controversy passed, although not specifically mentioned, and the lapse of two years since the discharge does not have the effect of re-investing the bankrupt with title, therefore, he can not recover.

F. W. Darby for appellant.

G. W. Duvall for appellee.

JESSAMINE COUNTY v. SWIGERT'S ADM'R.

SAME v. NEWCOMB-BUCHANAN CO.

Filed February 5, 1887. Appeals from Louisville Law and Equity Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Powers of corporations—In this country all corporations, whether public or private, derive their powers from legislative grant, and can do no act for which authority is not expressly given, or which may not be reasonably inferred.

2. The funds of a corporation can not be diverted from the company's charter purposes, however absolute the powers conferred upon the directors may appear.

3. Case adjudged—The charter of the Kentucky River Navigation Co. provided that the business of the company should be "the improvement of the navigation of the Kentucky river and its tributaries by building additional locks and dams." The charter further provided that as soon as the company should have completed two locks and dams it should have the right to lease the locks and dams already built, which belonged to the State, for the period of fifty years, at a stipulated rent. The company began work on the additional locks, but soon abandoned it, many of the stock subscriptions having been declared invalid. After the abandonment of the work the organization of the company was kept up and the old locks and dams taken possession of under a lease from the State. Creditors whose debts were contracted by the

company in keeping the old locks in repair seek to subject to the payment of their debts the unpaid balance of a stock subscription made by the appellant. Held—That the subscription was made for the purpose of building additional locks and dams, as is clearly defined by the charter, and can not be diverted from that purpose.

4. Stock subscriptions—Rights of creditors—Where a creditor of an insolvent corporation simply seeks payment of his debt out of an unpaid stock subscription, it is the duty of the defendants, if there are other creditors or debtors, to ask for a settlement and an equitable distribution of the assets, and if they fail to do so, the only inquiry is as to the liability of the defendant stockholder to the plaintiffs for the payment of their debts.

Wm. Lindsay and James S. Ray for appellant.

Brown, Humphrey & Davie and Goodloe & Roberts for appellees.

DAVIS v. BUFORD, EX'OR.

Filed February 8, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Devise—Perpetuity—A testator devised certain estate to his executor in trust, with directions to apply as much of the income as might be necessary to the support of M. during her life, and after her death the estate to go to D. with the proviso that if she should die without children it should then go to four others of the testator's kindred, and if any of them should be dead, leaving children, his portion to go to his children; and if no children, to the survivors of the four devisees. Held—That the devise does not create a perpetuity, and thereby become void or vest the title in the first devisee. The creation of two life estates in the same property does not destroy the devise.

Peters & Tyler for appellant.

C. Brock for appellee.

KINCHELOE v. McCANE.

Filed February 8, 1887. Appeal from Marshall Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Mistake of appraisers—A mere mistake in the judgment of appraisers as to the value of the land appraised is not sufficient ground for setting aside the sale.

2. Judicial sale—Agreement to suspend—A decree for the sale of land provided, by consent of parties, that no sale should take place for thirty days from the date of the judgment, and if within that time the defendant should in writing assign and transfer to the plaintiff the full benefit of a certain mortgage, in order to further secure the plaintiff, then no sale should take place for one year, and in the event the defendant failed to pay the plaintiff's judgment in full within the period of one year, then the plaintiff should have the right to a sale of the land for the unpaid balance. The sale was made after having been delayed three years, no attempt having been made by the defendant to comply with the terms upon which the sale was to be suspended. Held—That there was no judicial discretion given the commissioner who, after the expiration of the prescribed time, had no dis-

oretion but to sell the property as directed. Therefore, the defendant has no right to complain, the sale having been delayed nearly three years instead of one year.

W. G. Bullitt for appellant.

Gilbert & Reed for appellee.

EDMUNDS, &c. v. LEAVELL'S ADM'R.

Filed February 10, 1887. Appeal from Barren Circuit Court. Opinion of the court by Chief Justice Pryor, affirming; Judge Lewis not sitting.

Mortgage—Correction of certificate—*Lis pendens*—E. and wife mortgaged the wife's land to L. The clerk in writing out the certificate failed to include in it the deputy's memorandum of acknowledgment, which was indorsed on the mortgage. The wife died, her husband and two sons surviving. One of the sons conveyed his half interest in remainder to his father, subject to the lien of L. Suit was thereafter instituted by L. to enforce his mortgage lien. Pending the action E., the surviving husband and life tenant, mortgaged his interest, including that purchased from his son, and the other son sold his half interest to S. A demurrer to the petition having been sustained, L. then filed an amended petition, setting up an act of the legislature attempting to cure the defect in conveyances which were inoperative by reason of the failure of the clerk to include the deputy's memorandum in his certificate. The plaintiff alleged that the omission of the clerk was through neglect or ignorance, and asked for all the relief to which he was entitled. The lower court subjected the husband's life estate and also the half interest which he had acquired from his son. Held—That as the action to enforce the mortgage lien was pending when the several transfers of the property were made, it was notice to all purchasers of the right of the mortgagee to enforce his lien by reason of an equity growing out of the execution of the mortgage, and, therefore, the mistake of the clerk should, under the prayer for general relief, have been corrected, and the entire property subjected. But the relief granted was proper, as the husband executed the mortgage with a clause of warranty, and has since acquired title to one-half of the property, expressly subject to the plaintiff's lien.

Porter & McQuown for appellants.

J. W. Jones and Richards & Hines for appellee.

LOGAN COUNTY NATIONAL BANK v. TOWNSEND.

Filed February 10, 1887. Appeal from Logan Circuit Court. Opinion of the court by Judge Lewis, affirming.

Banks—*Ultra vires*—Contracts—Appellee sold and delivered to appellant county bonds for which it paid him at the rate of sixty-eight and one-half cents on the dollar, and as a further consideration agreed to replace the bonds upon demand at the same price or less. Appellee having offered to repay to appellant the amount so paid him for the bonds, and demanded their return, which was refused, instituted this action, asking judgment for the difference between the amount paid him and the par value of the bonds,

which they were worth when the demand was made. Recovery is resisted upon the ground that the contract is void for want of mutuality and for want of consideration; that the contract is not within the scope of the powers of the cashier with whom it was made, and that it is ultra vires the corporate authority of the bank. Held—

1. There can arise no question of a want of mutuality, as the contract has been fully executed by appellee, and nothing more remains to be done by him to entitle him to demand full performance by appellant of what it agreed to do.

2. It is not a pertinent inquiry whether the consideration for the contract was sufficient. It was made at the instance of appellant, and, we must presume, with the expectation of profit, and if the bonds had been kept by appellant no loss would have resulted from returning them, while a greater than the legal rate of interest would have been realized on the amount invested.

3. The bank, having elected to avail itself of whatever benefit might flow from the contract, can not deny the authority of the cashier to make it.

4. Although there may be a defect of power in a corporation to make a contract, yet if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has by its promise induced a party relying on the promise, and in execution of the contract, to expend money and perform his part thereof, the corporation is liable on the contract.

5. Verdict—Section 320 of the Civil Code, which provides that "if by a general verdict either party be entitled to recover money of the adverse party, the jury in their verdict must assess the amount of recovery," was not intended to apply where the amount of recovery is not made an issue of fact or left to the discretion of the jury.

Browder & Edwards for appellant.

John S. Rhea and Wm. Lindsay for appellee.

JONES v. LANGDON.

Filed February 12, 1887. Appeal from Pulaski Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Trespass—Title—In this action to recover damages for the cutting and carrying away timber, as the plaintiff was not in possession of the land from which the timber was taken, it is incumbent on him to show title in himself.

Before the cutting of the timber complained of plaintiff sold the land to C. & Co. and executed to them a bond for title, and they conveyed the land to M. in trust for the benefit of their creditors. Plaintiff afterward attempted to cancel his trade with C. & Co., by releasing the purchase money and receiving back his title bond. He also offered to show that one L. bought up most of the debts on C. & Co., and purchased of the trustee all their property and took possession of the same, but this evidence was excluded.

Held—That the plaintiff can not maintain the action. The title having been conveyed to the assignee, C. & Co. had no power to reinvest plaintiff with title, although the assignee may have sold to L.

O. H. Waddle, T. Z. Morrow and W. C. Curd for appellant.

STEWART v. HOSKINS.

Filed February 12, 1887. Appeal from Knox Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Judicial sales—Reversal of judgment—The reversal of a judgment for the sale of land does not affect the title of a purchaser under it if the court had jurisdiction of the subject-matter and the parties, and this is true even where the plaintiff is the purchaser; but the party upon whose appeal the judgment was reversed is not without remedy.

In an action by S. to enforce a lien upon land, H. claimed a prior lien. The court ordered a sale of the land to satisfy the lien of S., holding that H. had no lien. H. appealed, and pending the appeal the land was sold, S. becoming the purchaser. Thereafter the judgment was reversed, the court holding that H. had a prior lien. Upon the return of the case the court properly refused to set aside the sale, which had been confirmed, but directed a sale of the land to satisfy the debt of H. Held—That this was error, as S. acquired a perfect title by his purchase, but H. is entitled to a personal judgment against S. for the amount of his debt, provided the property is worth that much, and if not, then for the value of the property; and upon the payment by S. of the debt the chancellor will require H. to assign to S. his judgment against the debtor without recourse.

2. Mortgage—A father made a will, devising his estate to his two sons, L. and H., and after making the will, surrendered the property to them, as if they held by purchase from him. L. executed to H. a writing, reciting that "In consideration of \$1,000, and the maintenance of father and mother, I let J. till my land and charge him no rent, and I am not to pay any interest on said money. The said H. has a lien on my land for the \$1,000 until paid. This arrangement was made with the consent of the father, who was still invested with title to the land. H. remained in possession under this writing until this action was instituted by S. seeking to subject the land to a debt of L., the father being dead. H. was made a defendant, and called on to assert his lien. After this action was instituted L., in the year 1876, executed to H. a bond for title, claimed to be in pursuance of the real purpose and meaning of the original writing, which was executed in 1868. Held—That while the proof conduces to show a purpose to sell when the original writing was executed, the writing can not be construed as anything but a mortgage.

Wm. Lindsay and Isaac A. Stewart for appellant.

HAHN & TRAPP v. TRUSTEES OF BELLEVUE.

Filed February 15, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Holt, affirming.

Street improvements—Limitation—Contractors entered into a contract with the trustees of a town for the improvement of a street, the contractors agreeing to look alone to the assessments upon the abutting lot owners, and in no event to the town, for their compensation, save as to the cost of the

intersections. Some of the abutting lot owners paid their assessments, but others failing to do so the town sought by suit to compel payment. It was decided by this court upon appeal that the charter of the town did not authorize the assessment of the abutting lot owners. The contractors then sued the town, and it was decided by this court upon appeal that the town was not liable. The contractors seek by this action a judgment permitting them to remove the material used by them in the construction of the street save at the intersections, and also except that portion of the street in front of the lots of those who have paid their assessments. Held—

First—The plaintiffs can not maintain the action without offering to refund what they have received, having been paid for the intersections, and some of the assessments having also been paid to them.

Second—The action is barred by limitation, more than five years having elapsed between the completion of the work and the institution of the suit. The plaintiffs can not claim that the assertion by the town trustees of a power which had not been conferred upon them amounted to a constructive fraud, as plaintiffs were bound to take notice of the want of power equally with the trustees.

John S. Ducker for appellants.

T. P. Makibben for appellees.

ANDERSON v. COMMONWEALTH.

Filed February 15, 1887. Appeal from Magoffin Circuit Court. Opinion of the court by Judge Bennett, affirming.

Criminal jurisdiction—When a statute creating a criminal court is repealed criminal jurisdiction is restored to the circuit court, where it is placed by the Constitution in the absence of express legislation.

Wood & Day and W. W. McGuire for appellant.

P. W. Hardin for appellee.

HARLAN'S HEIRS v. ARTHUR.

Filed February 17, 1887. Appeal from Greenup Circuit Court. Opinion of the court by Chief Justice Pryor, overruling motion.

Lost records—Where the officer's return upon an execution has never reached the clerk's office from which the writ issued it is not a part of the records of the court, and can not be supplied by a commissioner under the provisions of section 4 of chapter 73 of the General Statutes. If the lost return was a report of the sale of land under the execution the remedy of the purchaser is in a court of original jurisdiction, where the equitable title may be set up and a deed executed if the facts are established.

Quære—Does not section 4 of chapter 73 of the General Statutes apply alone to the courts inferior to this court, and to cases where records have been lost or destroyed that affect the entire public, and not to the loss of a single paper that may be supplied by notice to the adverse party and proof taken?

B. F. Bennett for motion.

JONES v. COMMONWEALTH.

Filed February 17, 1887. Appeal from McCracken Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

Indictment—Setting up betting contrivance—An indictment for setting up and conducting a contrivance used in betting, which alleges that the defendant "did set up and conduct a contrivance used in betting, where by money was won and lost," and that "the contrivance aforesaid was what is commonly called a 'crap board and dice,' is sufficient," it not being alleged that the contrivance is one ordinarily used in betting.

Thomas E. Moss for appellant.

P. W. Hardin for appellee.

SUPERIOR COURT ABSTRACTS.

ROWE, EX'OR, &c. v. FOGLE, &c.

Filed January 26, 1887. Appeal from Ohio Circuit Court. Opinion of the court by Judge Barbour, reversing.

Attorney's lien—A vendee, by his attorneys, instituted an action against his vendor to enforce a contract made by him with the defendant for the purchase of a tract of land, and, if that could not be done, for the recovery of the money which he had, under the contract, paid to the defendant. After defense had been made the parties compromised and the case was dismissed, each party paying his own cost. Nothing was paid by the defendant to the plaintiff to secure the settlement. The plaintiff's attorneys were by the lower court adjudged a lien upon the land of \$100, a personal judgment rendered in their favor against the defendant for that amount. Held—That this was error. The attorneys are not entitled to a lien upon the land because the action was not prosecuted to a recovery, and are not entitled to a lien upon any demand their client may have against the defendant for the money paid to him, there having been no election to assert that claim, the primary object of this suit being to enforce the contract.

E. C. Hubbard and J. E. Rowe for appellants.

J. R. Fogle for appellees.

ARLING, &c. v. KENTON BUILDING AND SAVINGS ASSOCIATION.

Filed January 26, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

Corporations—Rights of stockholders—Certain members of a building and savings association, who had borrowed from the association the full amount of their respective shares, securing the same by mortgages on real estate, met together and without authority of the charter or constitution, and without the consent of the other members, agreed among themselves that they would each pay up at once an amount equal to the dues occurring on their

respective shares up to a certain date and no more, and that their mortgages should be canceled by the association. The directors then in office accepted said payments and caused the several mortgages to be canceled, and released them from any further obligation to pay their weekly contributions, thus practically dissolving the association. Certain of the members who have not borrowed from the association the amounts of their respective shares, and who did not consent to this arrangement, suing for themselves and other members of the same class, instituted this action averring these facts and the further fact that there is yet due them on their shares a large balance. They pray for a dissolution of the association, a settlement of its affairs, a judgment against the defendants, etc., Held—

1. Where a joint stock incorporated company is established for a definite purpose prescribed by its charter, not even the majority can make a valid appropriation of the funds of the corporation to a different purpose. Therefore, this action can be maintained.

2. As the common interest of the numerous stockholders is involved, the plaintiffs were properly allowed to sue for themselves and other stockholders having a like interest.

3. Though the defendants each owe several amounts, it is not necessary that a separate action should be instituted against each to recover what he may be owing.

4. The statute of limitation is not well pleaded. The averment that more than five years has elapsed since the accruing of plaintiff's claim is not sufficient. The averment should have been that more than five years had elapsed before the institution of the action.

5. All the delinquent stockholders should be before the court, and their liabilities ascertained and determined.

It was error to render judgment against only a part of the delinquent stockholders, thus compelling them to pay not only their pro rata of the sum necessary to equalize the various stockholders, but the pro rata of the remaining debtors.

J. G. Carlisle and Wm. Goebel for appellants.

O'Hara & Bryan for appellee.

BUCKLER v. MT. OLIVET AND SARDIS TURNPIKE ROAD CO.

Filed January 26, 1887. Appeal from Robertson Circuit Court. Opinion of the court by Judge Ward, affirming.

Corporations—Right to certificate of stock—In this action to compel the officers of a corporation to issue to the plaintiff a certificate of stock for certain shares to which he claims to be entitled, the petition avers that several different persons each subscribed for one or more shares of stock in said corporation; that said persons assigned said stock to plaintiff, and that defendant upon demand refused to issue a certificate of stock to him or to allow him to have any voice in the corporate affairs. Held—That if the action could be maintained in any event, it certainly can not be maintained in the absence of an allegation that the plaintiff's assignors ever paid for the stock subscribed for by them, or that the corporation ever issued to any of plain--

tiff's assignors a certificate of stock in said corporation, or by any other act recognized or admitted that they were entitled to a certificate of stock for the shares subscribed by them respectively, or any part thereof.

W. Buckler for appellant.

E. C. Phister for appellee.

WALKER v. THOMAS.

Filed January 26, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Failure to claim credit—Although a debtor has allowed judgment to be rendered against him without claiming a credit to which he was entitled, he may maintain an independent action against the creditor to recover the money paid for which he received no credit, but he is entitled to recover only legal interest from the time the payment was made, and not the interest borne by the debt upon which the payment should have been credited.

2. Injunction—The plaintiff in a judgment being a nonresident, the defendant, if he has a demand against him, may enjoin the collection of the judgment until his demand can be ascertained and the one set-off against the other.

3. Case adjudged—Appellant recovered judgment against appellee for \$773.76, with interest at 10 per cent. from July 29, 1876. Appellee instituted this suit to enjoin the collection of \$446.35 of the judgment as of date September 26, 1881, that being the amount of a credit to which he claims he was entitled, with 10 per cent. interest from the date the payment was made. The injunction was asked until appellee's demand could be ascertained and the one set-off against the other, the appellant being a nonresident. Upon final hearing the injunction was made perpetual.

Held—That this was error, as the court thereby in effect applied the credit as of the date the payment was made on a judgment bearing 10 per cent. interest, whereas the appellee was entitled to recover only the amount paid with 6 per cent. interest.

E. E. Settle and J. J. Orr for appellant.

O. B. Hallam for appellee.

MILTON, &c. v. THOMPSON, &c.

Filed January 26, 1887. Appeal from Webster Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Appeals—Reversible errors—It appears from the judgment that there was a commissioner's report of settlement, to which there were exceptions, which "were sustained in so far as the report does not agree with the judgment." Neither the report nor the exceptions are in the transcript. Held—That this court can not know that the report was more favorable than the judgment; and if less favorable, the court can not know that there was an exception to it in regard to the matter of which complaint is now made. The judgment can not, therefore, be reversed.

2. Errors set-off against each other—In suits in equity involving the settlement of accounts the judgment is never reversed unless it appears that the

judgment was prejudicial to the substantial rights of the party appealing; even without a cross appeal one error may be set off against another to sustain the judgment.

G. H. Towery and Givens & Hill for appellants.

F. M. Baker for appellees.

LOUISVILLE, CINCINNATI & LEXINGTON R. R. CO. v. BATES.

Filed January 27, 1887. Appeal from Gallatin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Restitution of money paid on reversed judgment—A party who has coerced money upon a judgment which has afterward been reversed, should, at the instance of the adverse party, be required by rule to restore the money before being allowed to further proceed with his action, and that the defendant is insolvent is not a sufficient response to the rule; but for the failure to order restitution in this case the court refuses to remand the case with directions to set aside the judgment and verdict, nothing appearing to show that the defendant was prejudiced, and two trials having been had, each resulting in a verdict for the same amount.

2. While the fact that the defendant has pending an independent action to recover the amount paid by it on the reversed judgment may not preclude it from proceeding by rule in this action, still, having thus elected to proceed, it is in no attitude to demand a strict enforcement of the rule above laid down.

3. The judgment entered upon the verdict should have been by the court, sua sponte, credited by the amount which the plaintiff received from the defendant on the judgment which was afterward reversed.

4. Presumption of negligence overcome—In an action against a railroad company to recover the value of stock killed by its trains the uncontradicted and unimpeached testimony of such employes of the company as are presumed to know the facts, that there was no negligence, overcomes the presumption of negligence that the law raises from the fact of the killing.

5. Evidence—The defendant having introduced witnesses experienced in the running of trains, who testified as to the distance within which a train of cars, running at a stated rate of speed, under given circumstances, could be stopped, it was competent for the plaintiff to prove in rebuttal, by witnesses who had seen running trains stopped to avoid the injury of stock, at or near the place where plaintiff's stock was killed, within what distance those trains were stopped.

L. L. Tiller and Winslow & Winslow for appellant.

Masterson & Gaunt for appellee.

BUCKNER & TERRELL v. BOGARD, &c.

Filed January 26, 1887. Appeal from McCracken Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, affirming.

Supersedeas bond—Appellants obtained personal judgment against M., and under an attachment a judgment setting aside a deed from M. to B. as fraudulent, and ordering the land to be sold to pay, first, a debt due to another party; and, second, the appellants' debt. B. appealed, superseding

only the sale of the land under the judgment. The bond was a copy of the form appended to the Code. The judgment was affirmed, and this is an action on the supersedeas bond, the damages claimed being for rent, for damage done the land, depreciation in value, attorneys' fees on appeal, and interest. Held—That the obligors are not liable for depreciation in value of the land, either by reason of general causes or by particular accidents. Moreover, as the land has not been sold, it does not appear that the obligees have been injured, as the land may bring enough to pay both the prior claim and their judgment. Nor are the obligors liable for attorneys' fees, there being no provision in the bond to pay all damages that may result.

W. D. Greer for appellants.

C. S. Marshall and E. W. Bagby for appellees.

JENKINS v. RIST'S ADM'R.

Filed January 26, 1887. Appeal from Logan Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Contracts—J. covenanted with R. for a valuable consideration that in the event of R.'s "sickness" during the year 1884 he would give him "attention and care." J. now sues to recover an additional sum for "attention and care" to R. during his sickness from smallpox in the year 1884.

Held—That he can not recover, as the stipulation of the contract included sickness from smallpox. The court can not place a limitation on the contract which the parties did not themselves prescribe.

H. G. Petrie and Browder & Edwards for appellant.

RAMSEY & BROTHER v. BEEDLE & KELLY.

Filed February 22, 1887. Appeal from Shelby Circuit Court. Opinion of the court by Judge Barbour, affirming.

Parol testimony to vary writing—Corn planters were sold under a written contract signed by both parties, which provided that "no agreement whatever except those incorporated herein will be recognized by us." There was no warranty or representation in the contract as to quality or fitness of the corn planters for any purpose. Held—That it was not competent to show by parol evidence what the representations of the vendors or their agent were in regard to the quality or fitness of the planters.

L. A. Weakley for appellants.

L. C. Willis for appellees.

MEAGHER v. CARPENTER.

Filed February 2, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Sales of personal property—When one person sells to another person property which at the time of sale, without the knowledge of either, has been lost or destroyed, the vendee can recover of the vendor what he has paid on the purchase.

2. Warehouse receipts—The statute authorizing warehouse receipts was not intended to change the rights of the parties to a sale as between themselves, as they existed before the passage of the law, and now exist in ordinary sales of personal property.

B., the proprietor of a government bonded warehouse, sold to M. a lot of whisky then stored in the warehouse, for which he executed and delivered to M. his warehouse receipts. M. sold fifty barrels of the whisky to C., and assigned and delivered to him B.'s receipts therefor. At the time of C.'s purchase three of the fifty barrels were empty, but that fact was not then known. C. paid the tax on the whisky, including that on the three empty barrels, and withdrew the forty-seven barrels. He now seeks to recover of M. the amount paid him for the three barrels, and also the tax paid on those barrels, which he was obliged to pay in order to withdraw the remaining barrels.

Held—That he is entitled to recover the whole amount.

A. Duvall for appellants.

Ira Julian for appellees.

RASCO v. SHEET & SON.

Filed February 2, 1887. Appeal from Trigg Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Separation of conclusions—The section of the Code providing for a separation of conclusions of law and fact, where questions of fact are tried by the court, does not apply to a motion to vacate an order of arrest.

2. Exemptions—Housekeepers—The fact that a debtor who has been "a housekeeper with a family" has made preparations to move to another State does not deprive him of the character of a housekeeper, and, therefore, does not deprive him of the benefit of the exemption laws of this State.

3. While the sale of exempted property for reinvestment in like property does not in and of itself work a waiver or abandonment of the rights secured by the statute, still the indiscriminate sale by a debtor of his property, both that which is and that which is not exempt, and a mingling of the proceeds, does amount to a waiver.

4. A contract for indulgence should be mutual and capable of ascertainment as to the time when it is to be performed, or it will be construed as a contract to be performed then, or within a reasonable time.

In this case the debtor having contracted for indulgence "until he could provide for or make the money to pay the debt," having sufficient money in his pocket to pay the debt, it was a breach of the contract for him to depart from the State without doing so.

Fenton Sims and R. A. Burnett for appellant.

Thos. C. Dabney & Sons for appellees.

PARKS v. PARKS, &c.

Filed February 2, 1887. Appeal from Nicholas Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Rights of mortgagee—The mortgagee of personal property may, after condition broken, maintain an action to recover possession of the property, and may, therefore, enjoin the sale of the property under execution.

2. Increase of mortgaged stock—A mortgagee has the same right to the issue of female animals embraced in the mortgage that he has to the mothers

themselves. Whatever may be the correct rule as to rents and profits, the issue of live stock is not on the same footing.

3. Delay in executing judgment—The long delay of the mortgagee in enforcing a judgment for the sale of the mortgaged property is not conclusive evidence of fraud.

In this case, at the time the executions complained of were levied, several terms had passed since the master was ordered to sell the mortgaged property, but at each term he made report that he had not sold, and further time was given to execute the order.

Held—That the right to enforce the judgment has not been lost. It is not to be presumed that these orders were procured with a fraudulent purpose to injure the creditors of the mortgagor.

John P. Norvell for appellant.

Thomas Kennedy for appellees.

McMURTY v. POPHAM.

Filed February 2, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, reversing.

1. A copyright is not secured until two copies of the publication are delivered at the office of, or mailed to, the librarian of congress, as provided by section 4959 of the Revised Statutes of the United States, and even if that fact can be proved by the certificate of the librarian, the certificate relied on in this case is not sufficient for that purpose.

Appellee sold to appellant the copyright for Daviess county of "Benham's Arabic Crystal Soap," covering the right to sell and convey family rights in said territory to make and use said soap. This is an action on the note given by appellant as a part of the consideration therefor. Appellant denying that appellee had any such copyright, appellee, to prove title, relies on the certificate of the librarian of congress, in which, after giving the title of the book of "receipts," which title he certifies has been deposited in his office, he states: "20 of the above publication deposited July 8, 1875." Held—That this certificate is not evidence that the copies deposited were copies of the publication for which appellee claimed to have the copyright.

G. W. Jolly and W. P. D. Bush for appellant.

G. W. Williams & Son for appellee.

TOWN OF VERSAILLES v. VERSAILLES AND MT. VERNON T. P. R. CO.

Filed February 2, 1887. Appeal from Woodford Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Town may subscribe to turnpike company—A town having the power to provide for the opening, improving and repairing of streets in the town may accomplish these objects by subscribing to the stock of a turnpike road company.

2. Street improvements—The provision in the charter of appellant empowering the trustees to cause and procure the streets of the town to be graded, paved, etc., at the cost of the lot owners fronting on the streets is not a limitation on the general power of the town trustees in relation to the im-

provement of the streets, and they have, therefore, the power to open and improve streets at the general expense of the town.

3. Contracts—Failure to demand performance—When the defendant has received the entire consideration for performance on his part, the defense that the plaintiff did not come within the stipulated time to demand performance will not avail, it not appearing that performance is more difficult or onerous at the time of the demand than it would have been at the time stipulated.

Appellant subscribed to the stock of a turnpike road company, the amount subscribed to be paid in equal installments, the first installment to be paid when the first mile of the road should be completed, and the same amount each subsequent year, provided an additional mile should be completed each year until the whole should be paid. Appellant paid three installments, several years intervening between the payment of the last two paid. In this action to recover the balance of the subscription, Held—That it is not an available defense that payment of the several installments was not demanded as they fell due.

4. Acceptance of streets—Where the charter of a town provides that the trustees shall have power by ordinance to receive and accept any street or alley, and the manner in which the acceptance is to be made is not prescribed in the charter, the intention of the board of trustees, to be gathered from their acts or ordinances, will be considered.

In this case an ordinance providing that a turnpike company should macadamize and keep in repair so much of a road as was within the town limits, and which was a continuation of a street, is evidence of an acceptance of that part of the road as part of a street of the town.

5. Pleading—The town can not upon demurrer rely upon the fact that the street has not been accepted; it can only do so by answer.

6. Demand—Where the promise is absolute and unconditional to pay money no demand need be alleged. but as appellant in this case promised to pay a certain sum when a stated amount of work was done, notice of the completion of the work should have been given and demand made, and notice and demand should have been alleged.

W. O. Davis and E. M. Wallace for appellant.

J. W. Gillespie for appellee.

KENTUCKY LODGE, NO. 39, I. O. O. F. v. LIMEBACK.

Filed February 9, 1887. Appeal from Gallatin Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Benefit societies—Sick benefits—Members of a voluntary association who desire to assert rights growing out of their society relationship must appeal to the tribunals created within the association for that purpose, and are bound by the decisions of those tribunals.

Under the rules and regulations of appellant, a benevolent society, the question whether a member is entitled to sick benefits is to be determined by the noble grand, the principal officer of the lodge, with a right of appeal to the lodge and then to the Grand Lodge of the State. Appellee, a mem-

ber, having applied to the noble grand for sick benefits, and been refused, instituted this action, without appealing to the lodge. Held—That the civil court will not hear his complaint.

2. Pleading—The defendant having set forth in its answer certain rules and regulations which it charged it had adopted, the denial of the plaintiff that the defendant had furnished any tribunal for determining the right of a member to sick benefits was but the pleader's construction of those rules, and not a denial of the adoption of the rules.

¶ J. J. Landram and Masterson & Gaunt or appellant.

George C. Drane for appellee.

CITY OF COVINGTON v. LUDLOW.

Filed February 9, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Taxation—Injunction—A court of equity will not interpose to prevent the collection of a tax unless upon the ground of fraud, or for the reason that the alleged tax creates a cloud upon the title, or unless from the enforcement of the tax a multiplicity of suits is to be apprehended.

2. The assessment as a whole, instead of separately, of lots which lie separate and apart from each other, while irregular is not void under the charter of appellant, which provides that in listing property for taxation there shall be affixed "against the name of each inhabitant the amount of his real estate in said city, with a proper description by number or situation, and also the true and just value," etc., and that the clerk "shall make out a tax bill against each person assessed with taxes, specifying therein each item of taxation, the value thereof and the tax imposed."

3. Excessive valuation—Fraud—While the general rule is that excessive valuation by an assessor is not of itself evidence of fraud, yet where the excess reaches a point that it quadruples the value of the property, while in the instance of every other assessment the property is correctly valued, it strikes the mind of the court at once as being unconscionable and, therefore, fraudulent.

4. Mandamus will not lie to compel the board of equalization or the city council of Covington to hear the taxpayer's complaint, as they act in a judicial capacity in hearing such complaints.

W. K. Benton for appellant.

T. F. Hallam for appellee.

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KENTUCKY COURT OF APPEALS.

VALLANDINGHAM v. WORTHINGTON & CO.

(Filed January 27, 1887.)

1. Execution sales—Mistake of appraisers—While a mere mistaken opinion of appraisers as to the value of land levied on, and about to be sold under execution, will not give the defendant the right to redeem where the land brings more than two-thirds of its appraised value, but less than two-thirds of its real value, yet where such a result is caused by a mistake of the appraisers as to the tract of land they are called on to value, and a different tract is in fact valued, the debtor will be afforded relief in equity and allowed to redeem, the right of no third person having intervened.

2. Where land is surrendered by an execution defendant to be levied on, it is not necessary that he should, on the day of sale, direct the land to be sold, nor can he complain because the officer levied and sold without the production of the title papers.

3. To constitute a valid levy on land where the execution defendant surrenders the land to be levied on, it is not necessary that the officer should go upon the land and make the levy, or that he should notify the defendant of the endorsement of the levy, the object of such acts being to apprise the defendant of the levy, of which he is already apprised when he surrenders the land to be levied on.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Holt.

A portion of the land of the appellant, Lewis Vallandingham, was sold under execution in favor of the appellees, Worthington & Co., and purchased by them at less than two-thirds of its real value.

The debtor, by writing signed by him, both surrendered it to the officer for levy under the execution, and directed its sale without advertisement.

He now resists its recovery in this action of ejectment because he did not direct the sheriff to levy upon one of his several tracts of land; because he did not produce to him any title papers to the land levied on; or on the day of sale direct him to sell it; and because the officer did not go upon the land to make the levy or advertise it for sale.

The appellant appears to have owned several tracts of land, but they lie adjoining, thus forming one body; and he directed the officer to levy upon a particular portion of it, which was described in the surrender. It was not necessary that he should, on the day of the sale, have directed it to be sold, inasmuch as he had done this in the written surrender. If the officer was willing to levy and sell without the production of the title papers to the land, the execution debtor can not complain; nor was the sheriff bound to go upon the land to make his levy when it was surrendered to him by the debtor for sale. To constitute a valid levy upon real estate the officer must either go upon it and make it, or it must be surrendered to the officer for that purpose by the defendant in the execution, or the officer must endorse his levy and apprise the defendant of it. He must do some unequivocal act, showing an intention to make the levy, the object of such act being to apprise the debtor of the levy.

The appraisement of the land is regular in form; but it clearly appears that both of the appraisers believed they were valuing a different piece of land from that in fact levied upon and which was sold. They so testify.

Acting under this mistake they appraised it at \$20 per acre, when it is shown beyond question that it was worth from \$25 to \$30 an acre in cash. As appraised it brought at the sale over two-thirds of its value, but not that much of its real value.

The statute requires its appraisement before the sale. The right of the defendant to redeem is made to depend upon

whether it brings two-thirds of the value so fixed upon it. It is a general rule that a mere irregularity upon the part of the officer does not vitiate a sale or affect the title of the purchaser.

This is necessary to the stability of titles to land; and certainly the performance of any duty enjoined upon the officer subsequent to the sale as to it would not affect the purchaser's right, hence it was held in the case of *Reid v. Heasley*, 9 Dana, 324, that the omission of the officer to have the land appraised after the sale, as was then enjoined by law, did not render the sale invalid. It was not allowed to retroact upon the sale and avoid it. It was there said that the purchaser's "right rests upon his purchase under a valid execution issuing upon a valid judgment, and, being fairly made, can not be defeated by the subsequent omissions or delinquencies of the officer.

"If the land in fact sold for less than two-thirds of its value, it might be a question, upon a proper case made out, whether a court of chancery might not afford relief. The officer might, unquestionably, be made responsible to the debtor for any injury he sustained by reason of his delinquency. But to permit his subsequent omissions or derelictions of duty to invalidate the sale, without fault on the part of the purchaser, would be to establish a doctrine that would expose titles derived under execution to an uncertainty and insecurity that would drive from the arena of bidders all prudent and cautious "persons; diminish competition in bidding, and tend to produce a sacrifice to the injury of debtor and creditor."

The existing statute provides that the officer shall cause the land to be valued before the sale. This valuation is for the benefit of the debtor, and to secure him in his legal right to redeem if the land does not bring two-thirds of its appraised value.

We do not regard the statutory provision as so mandatory that a failure to literally observe it would necessarily render a sale void; but if a failure to follow it occurs, which is material and reaches to the essence of the debtor's rights, he may be allowed in equity to redeem. It is an office of equity to give

relief in case of mistake. Here the rights of no third party have intervened. 'The execution creditor was the purchaser, and it is clear that but for the mistake of the appraisers the appellant would have had the right to redeem. The mistake is of such a character that he has no remedy against the officer; and if now denied it he is remediless. Of course a mere mistaken opinion of the appraisers as to the value of land would not affect the sale. To so hold would render titles utterly insecure, and create a fruitful source of litigation. In this case, however, the mistake is not of that character. They utterly mistook the land levied on, and which was in fact sold, and appraised an entirely different tract, thereby depriving the debtor, who was not present at the sale, of his right to redeem. The valuation was not, therefore, fairly made; it resulted from a mistake other than the mere judgment of the appraisers, and was such a mistake as equity will take cognizance to correct. (Lawrence, &c. v. Edelen, 6 Bush, 55.)

The appellant should have been allowed by the lower court a reasonable time within which to redeem the land; and if done, this would in effect set aside the sale and the deed to the appellees; but if not done, then judgment should be rendered in their favor for the land.

[Judgment reversed, with directions to allow the amended answer tendered on June 11, 1885, to be filed, and the case to be then transferred to equity and for further proceedings consistent with this opinion.

Warren Montfort and H. Clay White for appellant.

W. W. Dickerson for appellees.

SINGLETON, &c. v. McQUERRY.

(Filed January 15, 1887.)

1. The alteration of a note by the addition, at the instance of the obligee, of another maker, after the issual of the paper, and without the consent of the first one, vitiates it.

2. Vendor and vendee—Limitation—A vendee is in possession under a title

bond, and resists the enforcement of the lien for the purchase money on the ground that the notes executed therefor are void, and that the claim for the purchase money is barred by the five years' statute of limitation. Held—That he must elect either to rescind the contract of purchase upon equitable terms or to submit to the enforcement of the lien.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Holt.

D. W. Singleton, on February 16, 1876, bought from the appellee, Joseph McQuerry, a tract of land, and executed the two notes now in suit for the two last payments. The appellee gave to Singleton a bond for a title, it to be made when all of the purchase money should be paid. The latter died intestate, in August, 1878, leaving a widow and three children, who are the appellants. He left no estate save this land, and no administration has ever been granted.

After his death, and without the knowledge or consent of the appellants, the appellee, on September 20, 1878, procured one G. W. Singleton to sign the notes as an obligor, and one or the other of them being then, in some way not disclosed by the record, in possession of the title bond, the appellee made this endorsement upon the back of it:

"I, Joseph McQuerry, agree to give said Singleton three payments, as follows: First, \$100 on the 20th of September, 1879; the second \$100 on 20th of September, 1880; the third \$100 on 20th of September, 1881, the whole amount for which I hold Singleton's note, being the remainder on above land payments.

"This September the 20th, 1878.

(Signed) "JOSEPH McQUERRY."

He also agreed with G. W. Singleton that he should have so much of the land at \$7.50 an acre as would amount to the two notes on D. W. Singleton, which G. W. Singleton then signed and agreed to pay.

We have recited the above as facts, because the demurrer to the answer so admits. A personal judgment was asked against

G. W. Singleton, but not against the appellants, and the enforcement of a lien against the land.

The latter never consented to the arrangement or any part of it between the appellee and G. W. Singleton; indeed did not know of it, so far as appears from this record, until this suit was brought. They rely upon it to defeat the claim to subject the land, and present the plea of non est factum as to the signature of D. W. Singleton to the notes. They were not altered in the body, but G. W. Singleton simply signed his name to them as an obligor.

As early as Pigot's case (11 Coke, 26) it was held that when any deed is altered in a point material by the plaintiff himself or a stranger, without the privity of the obligor, be it by interlineation, addition or erasure, it renders it void. This case has been followed ever since by the English courts, and recognized as the rule in perhaps all the States of our Union where the common law prevails, unless it be as to executed contracts and when the alteration is by a stranger.

It has been universally applied in case of all material alterations of written instruments by the holder without the consent of the party to be affected thereby, the reason being that the purity and integrity of legal instruments should be preserved.

It has generally been held that the adding of another maker or obligor to a bill or note is a material alteration because it alters its identity and affects its integrity. It can not be said that the maker promised in manner and form as stated in the declaration. This is the basis of the rule, save in a few States where it has been made to depend upon the question whether the alteration was fraudulently made. (Nicholson v. Combs, &c., 90 Ind., 515; Chappell v. Spencer, &c., 23 Barb., 584.)

Turning to the decisions in this State we find that in the case of the Bank of Limestone v. Penick, 5 Monroe, 25, where, after the issual of a joint and several promissory note by two, a third person, without their knowledge, signed it, and his name was inserted in a blank left in the body for that purpose, it was held to be a material alteration and rendered the note void.

In the case of Pulliam, &c. v. Withers, 8 Dana, 98, where the note, after its issual by the principal, was, without his knowledge, signed by a surety at the instance of the obligee, the doctrine in Bank v. Penick, supra, was reaffirmed; but it being unnecessary to do so, the court declined to decide whether the mere taking of another obligor would vitiate the paper in the absence of any alteration or change in the body of it.

In the case of Shipp's Adm'r v. Suggett's Adm'r, 9 B. Monroe, 5, however, the point was decided; and it was held that if, after the execution and delivery of a note by one obligor, another, without his knowledge, signed it at the instance of the obligee, that it rendered it void without any change in the body of it.

This rule is founded on good policy, which dictates that the integrity and legal identity of the paper should be maintained. The addition of another name changes the number of parties, the ratio of contribution, their relative rights, and the character and description of the instrument.

The obligors first signing may thereby be subjected to a change of jurisdiction in the event of litigation; and a surety who has obtained indemnity may incur the risk of its loss by the change of identity. If an additional name is procured in order to strengthen the debt, and not for some undue advantage, the holder can easily obtain the assent of the previous obligor. By the addition the paper speaks a different language, and has a different legal operation, thus showing that the change is material.

Mr. Story, after reviewing the various cases relating to the question, says: "But we think the wiser rule is that which looks first to the integrity of the instrument, and secures that, though there be no actual injury nor purpose of fraud." (2 Parsons on Notes and Bills, 559.)

In this we concur; and think, in the light of both authority and reason, that the addition, at the instance of the obligee, of another maker, after the issual of the paper, and without the consent of the first one, vitiates it.

In this case, however, no deed has ever been made to the land. The appellee yet holds the legal title. The appellants, it is true, are not asking that a title be made to them; but that they shall not be disturbed, although they admit that they are in possession of and claiming the land, and have never paid for it. In fact they are in this very suit upon the idea that the notes are not enforceable, but that the claim for the purchase money exists, pleading the five years' limitation statute as a bar to any recovery, thus manifesting that they intend to keep the land without paying for it. They are in equity; and to permit them to avoid the payment of the balance of the purchase money, and yet retain the land, would in effect work a fraud. Equity in such a case, in order to prevent it, reaches beyond the law; and while, for the reasons above stated, the appellee can not, in the face of their objection, enforce his notes as a lien upon the land, yet they can not be allowed to hold it without payment. It was error upon the part of the lower court to enforce the notes as absolutely binding, but the appellants must either elect to rescind the contract of purchase upon equitable terms or submit to the enforcement of the lien, and upon the return of the cause to the lower court the chancellor will afford them a reasonable opportunity to make this election.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

J. H. Brown and Anderson & Herndon for appellants.

H. C. Kauffman for appellee.

HART, JR. v. COMMONWEALTH.

(Filed January 22, 1887.)

Evidence—Uncommunicated threats—Upon a trial for murder or manslaughter threats by the deceased, although not communicated to the accused, are admissible in evidence as tending to show that the deceased began the difficulty, that matter being in issue, and being important for the purpose of determining whether or not the accused acted in self-defense.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Holt.

This is a conviction for voluntary manslaughter. In a difficulty between the appellant, Levi Hart, and John Veal, a bystander, who was in nowise engaged in it, by the name of Charles Waller was shot and instantly killed. A jury have found that the appellant did it. If so, it was undoubtedly unintentional upon his part, and done in shooting at Veal, who was also then killed. The case, therefore, turns upon whether the conduct of the appellant in so shooting was excusable. If he was first attacked by Veal, and acted only in self-defense, then it was excusable homicide.

The testimony is very conflicting as to whether the appellant or Veal began the conflict. Some witnesses testify that the one and some that the other made the first offensive movement and fired the first shot.

The appellant offered to prove that on the day previous to the killing Veal said that he would elect his man at the election, which was to occur the next day, or kill the appellant. This threat was not communicated to the accused, and the testimony was rejected. It is urged that it was competent by way of showing who brought on the difficulty.

The two men were opposing each other, being for different candidates. The threat substantially fixed a time when, in a certain event, it would be carried out. The difficulty did then occur; the event named was then in progress; and the issue now being who was the aggressor, is the evidence of the uncommunicated threat by the deceased competent to illustrate it? The question has not been heretofore directly decided by this court, and indeed we have little authority to guide us to a correct conclusion.

In the case of *Cornelius v. The Commonwealth*, 15 B. M., 539, the prisoner, who was being tried upon the charge of murder, introduced evidence of threats which had been communicated to him, and which had been made by the deceased. He then

offered to prove other threats upon the part of the accused, made a few days before the killing, and which had not been communicated to the prisoner. The lower court excluded them, but this court said:

“We think that this testimony should, under the circumstances in the case, have been admitted. It tended to confirm the other evidence, that Hopson had made threats against the prisoner, and to counteract a presumption of fabrication by the witnesses who gave that testimony. Besides, Hopson’s intention to make an attack on the accused was an important matter, as well as the belief of the existence of such an intention on the part of the prisoner.”

In the case just cited the admissibility of the uncommunicated threats was based upon the fact that they tended to confirm the communicated threats, and also evinced the intention of the deceased, and illustrated the question whether the one or the other was the aggressor.

In the case now before us no communicated threats were proven, hence the naked question is in hand, whether uncommunicated threats by the deceased are admissible for the purpose of showing whether he or the accused began the difficulty when this is in issue. In determining it, it must be kept in mind that the question before the jury is whether the accused is excusable upon the ground that the act was done by him in defending himself against an attempt by Veal to kill him or inflict upon him great bodily harm.

Threats to commit the crime for which one is on trial are competent as evidence against him upon the question whether he in fact did it, because they show an intention to do it, and, therefore, a probability is created that he is the person who did it.

If A enters a house where B is, and just before doing so he avows an intention to kill B, and shortly after entering a difficulty between them occurs in which A is killed, and it is a question which one of them began it, certainly the declaration of A, although uncommunicated to B, would be competent evi-

dence to illustrate the question who was the aggressor, and as tending to show that A made the attempt to carry out his threat.

There is in principle no difference between this evidence and that which we are now considering save in degree. In the one case the threat would in point of time be more convincing perhaps, but the only difference would be in the weight of the testimony. It may be said that threats are often the subject of false testimony; and that mischief will result from such a rule. This is true, however, to a greater or less extent of any species of testimony; and the tendency of the age is to widen the door for the admission of evidence, because it has been found by experience that justice is thereby promoted.

In the case of *Jewett v. Banning*, 21 N. Y., 27, it was held in an action for an assault and battery alleged to have been committed in the absence of witnesses, that evidence of former ill-will by the defendant against the plaintiff was competent as a circumstance to show its commission.

In 1 Wharton's Crim. Law, section 642, it is said: "Where A is charged with a murderous assault upon B, or with killing B (the plea of self-defense not being set up), remarks or threats affecting A made by B to a third party before the assault are not admissible in A's behalf, especially when it does not appear at what time they are communicated to him. Yet if the question is whether the deceased was the assailant, the fact that he declared beforehand that he meant to attack the defendant is material; nor on this issue is it necessary that the defendant should be proved to have had notice of such threats.

Again, in volume 2, section 1027, the author says: "Where the question is as to what was the deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to the defendant."

In the case of *Stokes* for the killing of James Fisk, 58 N. Y., 164, the question was directly presented; and it was there held that where it was a question before the jury whether the act of

the accused was done in defending himself, that recent threats upon the part of the deceased toward him were competent as evidence, although they had not been communicated to him.

They of course are not competent to show the *quo animo* of the defendant, or from what belief he may be actuated, because not having been communicated he can have none by reason of them. But where the question is at issue whether the one or the other was the aggressor; where there were no witnesses to the transaction, or if there were the matter is in doubt, we conclude that such testimony, be it worth much or little, is admissible as an aid to its solution.

We perceive no other error in the record, but for that indicated the judgment is reversed and the cause remanded for a new trial consistent with this opinion.

Watts Parker and Geo. Denny, Jr., for appellant.

P. W. Hardin or appellee.

WRIGHT V. COMMONWEALTH.

(Filed January 29, 1887.)

1. Arrests—The only cases in which a person other than a peace officer can make an arrest are where the person making it has reasonable ground to believe the person arrested has committed a felony, and where a magistrate or judge orders the arrest of one at the time committing a public offense in his presence. And not even a peace officer is authorized to make an arrest without a warrant issued and delivered to him, except when a public offense is committed in his presence, or when he has reasonable grounds to believe that the person arrested has committed a felony.

2. A person about to be arrested may resist if the provisions of section 39 of the Criminal Code are not complied with by the person attempting to make the arrest, as an arrest to be lawful must be made in the manner provided by that section.

3. Defense of dwelling—When a dwelling house is actually broken and entered by a portion of a party, combined and armed for the unlawful purpose of depriving one of the inmates of his liberty, and carrying him away in the night time, accompanied with an attempt to commit a felony, the person thus assaulted, as well as the owner of the dwelling, may resist with such force as may be necessary, even to taking the life of those present aiding and assisting, as well as those actually breaking and entering; and the owner of the building is not required to remain in his house, nor to retreat

from his house, but he has the right, outside or inside, to use such force as is necessary, or reasonably appears to him to be necessary, even after the party has fallen back, to prevent any further assault upon his person or his castle.

4. Same—When a case arises justifying the owner in resisting the breaking or forcible entrance of his dwelling house, his servants or guests may arm themselves for the purpose of resistance.

5. Evidence—Conspiracy—Where two persons are indicted jointly, the mere fact that a conspiracy is charged is not sufficient to deprive one of the testimony of the other; to have that effect the charge must be sustained by the proof.

6. Instructions—It was error for the court in instructing the jury to direct their attention to the interest of witnesses in the result, or to the character of the statements made by them.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge Lewis.

Appellant having, under a joint indictment against him and his brother, Elijah Wright, for the murder of William Wright, been convicted of manslaughter and sentenced to the penitentiary for twenty-one years, appeals.

The homicide occurred between 9 and 10 o'clock at night, on the premises of appellant, near his dwelling house, where the deceased, who was his uncle, had gone, accompanied by ten others, all but four being relatives and two of them brothers of appellant.

It appears that all the party, except the deceased and one other, were armed with guns or pistols, and, by agreement, when near the house, divided, two or three going to the back and the others to the front door, and their approach was so noisy and demonstrative as to awaken those inside, all of whom had gone to bed.

One of those who went to the back door was a brother of appellant, called "Black Hawk," who said in a loud, angry tone, "damn you, open the door," adding significantly, "Black Hawk is here now." The reply of the appellant was, "damn you, open the door yourself if you want it opened." And upon the same response being given to the second demand made, with a threat to kick the door down, it was kicked down, the shutter

falling inside upon a man named Johnson, who was sleeping on the floor.

The inmates of the house at the time were appellant, his wife, five children, Elijah Wright, who was there for the night, and Johnson.

When the door was thus forced open appellant was confronted by his brother, "Black Hawk," with a gun presented, and Elijah by another called Lunce Wright, likewise armed.

The evidence tends to show that the first shot was fired by Elijah at Lunce Wright, the shooting between the two beginning soon after the door was broken. But it clearly appears that appellant did not attempt to shoot until two or three shots had been fired in his house, one of them being aimed directly at him by "Black Hawk," whom he then shot at and wounded. As soon as the latter was shot he called on the crowd to rush up, whereupon appellant cried out for God's sake to stop firing into his house, as they had already killed one of his children. This, however, turned out not to be true, though amidst the noise and confusion caused by the firing and screaming and crying of his wife and children appellant might have reasonably supposed one or more of them was killed.

Perdue, one of the crowd, then called on them to fall back and give the woman and children a chance to get out, and the party did then fall back toward the corn crib, forty or fifty feet, where they stopped, still facing the house.

Soon after that appellant, having been told by Elijah that the party outside were reloading their guns, and directed to load his quick, went outside the house in his night clothes, and from the chimney corner fired the shot that killed William Wright.

The proof is that it was a moonlight night, and the snow was on the ground, and that appellant might have recognized the deceased at the time he fired. On the other hand, while it is only an inference, though a strong one, that any others of the party besides the two at the back door fired into the house before they fell back to the corn crib, it is proved that about the time appellant shot from the chimney corner firing was

going on, as the witnesses say, in all directions, at least two shots being in the direction of the house. One of them was fired by a person near the deceased, in the language of a witness, almost instantaneous with the one by appellant, the load striking the house near to him. The other was fired just before from the same vicinity by "Black Hawk," and by it Andrew Wright, one of the party coming from the house towards the corn crib, was killed. That shot was evidently fired under the belief that the person shot at was either appellant or Elijah Wright, for "Black Hawk" cried out with an oath when Andrew Wright fell that he had got one of them.

It appears that soon after the crowd fell back Elijah Wright fled from the house, but the precise time he left does not appear, though he fired and was fired at as he retreated, one of the persons firing at him being a justice of the peace.

It may be inferred that the ostensible purpose of the crowd in going to the house of appellant was to arrest Elijah Wright upon a charge of breach of the peace.

One of them, the justice of the peace, testified he issued a warrant against him late in the evening of the day of the homicide, but the court excluded that testimony. So the only evidence before the jury that a warrant was issued at all was by a witness who stated he heard appellant and Elijah Wright talking about a warrant, and that the former told the latter if he would go home with him and stay all night they would not arrest him. And it is proper to state in this connection that the testimony of that witness tended to show that appellant intended to resist the arrest of his brother if attempted at his house.

But there was no officer except the justice of the peace in the party when they went to the house of appellant, and the only pretext of authority of any one of them to make an arrest was the attempt of the justice of the peace to deputize Perdue, a private citizen, to do so.

There is no evidence that any one of the party informed Elijah Wright when they reached the house they came to arrest him, or that a warrant had been issued for his arrest, and it

does not appear that either the justice of the peace or Perdue spoke to appellant or Elijah Wright at any time that night. The only intimation given to them that the object of the crowd in going there was to make the arrest was by "Black Hawk," who said, when he went to the back door, "consider yourselves under arrest," accompanied with the remark, "damn you, open the door," and only one witness, he who was aiding in breaking the door, testifies to that fact.

It is proper to state, as illustrative of the feelings and motives of some of the party, that the justice of the peace testifies his object in going to the house of appellant was to protect him and Elijah from being hurt, yet he admits that he fired at the latter as he was fleeing from the house. It was also proved that "Black Hawk" said, at the time the warrant was issued, that some one was going to be killed, and he did not like Elijah, yet he was the one selected or permitted to demand admittance to the house.

There seems to have been some disturbance of friendship between appellant and William Wright, though there is no proof of a direct threat by either to do the other personal injury. It is, however, proved that Elijah Wright had made threats against two or three persons, including the deceased, on account of a law suit.

A somewhat extended statement of the facts in this case has been made because necessary to determine the various errors complained of:

1st. We think the court erred in refusing to permit Elijah Wright to testify in behalf of appellant.

There is a conspiracy charged in the indictment to murder the deceased, but the record contains no evidence whatever to sustain the charge. No witness states any fact from which it can be inferred that, previous to the attack by the party of which deceased was a voluntary member, there was any concert between appellant and Elijah Wright to take his life, either as the means or end of an unlawful design. And there being no evidence on the trial to support the charge of conspir-

acy, appellant was entitled to the testimony of Elijah Wright. And for the same reason evidence of previous threats by the latter was incompetent in the trial of appellant.

2d. Instruction 4 is improper because the court had no right to direct attention to the interest of witnesses in the result, or character of statements made by them, the jury being the sole judges of the weight of the evidence and of the credibility of the witnesses.

3d. By instruction 6 the jury were told in substance that if appellant knew there was a warrant issued against him and others, and that the deceased and others were there for the purpose of arresting him, then he had no right to use force to resist them, except to protect himself or family from death or great bodily harm, although the warrant was illegal.

That instruction has no foundation of either fact or law to support it.

The record in this case contains no evidence whatever that any warrant of arrest had been issued against appellant, or that he had committed any offense for which a warrant of arrest might issue, or that the party went to his house to arrest him. The evidence in regard to the warrant of arrest, meagre as it is, relates to Elijah Wright, and not to appellant at all. By whom and how arrests may be made as provided by the Criminal Code, the sections of which bearing on this case being as follows:

“Section 36. A peace officer may make an arrest.”

1st. In obedience to a warrant of arrest delivered to him.

2d. Without a warrant when a public offense is committed in his presence, or when he has reasonable ground for believing that a person arrested has committed a felony:

“Section 37. A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony.

“Section 38. A magistrate or any judge may orally order a peace officer or private person to arrest any one committing a

public offense in the magistrate's or judge's presence, which order shall authorize the arrest."

It will be perceived that the only cases in which any other person besides a sheriff, constable, coroner, jailer, marshal or policeman, who are, by section 26, denominated peace officers, can make an arrest is, under section 37, where the person making it has reasonable grounds for believing the person arrested has committed a felony, or, under section 38, where a magistrate or judge orders the arrest of one at the time committing a public offense in the presence of the magistrate or judge.

And not even a peace officer is authorized to make an arrest without a warrant issued and delivered to him, except when a public offense is committed in his presence, or where he has reasonable grounds to believe that the person arrested has committed a felony.

There is no evidence showing, or tending to show, that any of the party had reasonable grounds to believe that Elijah Wright had committed a felony, or even that their purpose was to arrest him for a felony, but the only offense for which they went to the house of appellant to arrest him, if such was their real object, was a misdemeanor previously committed, if he had committed any offense.

It is then plain that no one of the party had authority to arrest either appellant or Elijah Wright, the justice of the peace having no right to make it himself, or to deputize Perdue to do so.

Section 39 provides that the person making an arrest shall inform the person about to be arrested of the intention to arrest him, of the offense charged against him for which he is to be arrested, and, if acting under a warrant of arrest, shall give information thereof, and, if required, shall show the warrant.

An arrest made in substantial compliance with the terms of that section is a legal arrest, which no one can lawfully resist. But to make, or attempt to make, an arrest in disregard or violation of that section is an illegal act, which the person about to be arrested is not required to submit to. And if it

had been, even a peace officer, armed with a warrant, instead of the party of unauthorized persons, appellant would have had the right to resist with all the force necessary to prevent the breaking and entering his dwelling house at the time and in the manner it was done by the party of which the deceased was a member.

The deceased and those with him, therefore, not only had no authority to arrest either appellant or Elijah Wright, but the manner in which it was attempted constituted an assault upon appellant, which he and all the inmates of his house at the time, including Elijah Wright, had the right to resist with all the force necessary to prevent it, even to taking life, for, as has been said, "the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault upon a man's person, for a man's house is his castle." And it is well settled that when a case arises justifying the owner in resisting the breaking or forcible entrance of his dwelling house, his servants or guests may arm themselves for the purpose of resistance. (Wharton on Homicide, section 552, and authorities there cited.) It is true the rule is generally held not to be so extended as to excuse the killing of persons not actually breaking into a house, or in the act of breaking into it; but when, as in this case, the house is actually broken and entered by a portion of a party, combined and armed for the unlawful purpose of depriving one of the inmates of his liberty, and carrying him away in the night time, accompanied with an attempt to commit a felony, as was done in this case, the person thus assaulted, as well as the owner of the dwelling, may resist with such force as may be necessary, even to taking the life of those present aiding and assisting, as well as those actually breaking and entering.

Up to the time that the party fell back to the corn crib, as the facts now appear, the killing of appellant or any inmate of his dwelling house would have been murder, while the killing of any member of the party by an inmate of the house would have been excusable homicide. And appellant was not required to remain in his house, nor to retreat from his house,

but he had the right, outside or inside, to use such force as was necessary, or reasonably appeared to him to be necessary, even after the party fell back to the corn crib, to prevent any further assault upon his person or his castle.

A mere demonstration, or even threat, to break a dwelling house will not excuse a homicide by the owner or an inmate; but when, as in this case, it had already been broken and fired into and a felony attempted, appellant had the right to act according to surrounding circumstances as they appeared to him.

It was, therefore, improper for the court to omit from the instructions the qualification that appellant had the right to fire upon the deceased or any other member of the party if he believed, from all the circumstances as they reasonably appeared to him, that the deceased, or any member of the party, was about to forcibly re-enter his house or to fire into it.

It was also improper to make appellant's right to shoot depend upon there being no other reasonably apparent means of escape. He was not required to flee from his dwelling, but had the right to stand his ground and use all the force necessary, or that reasonably appeared to him necessary, in or out of it, to prevent a forcible re-entrance, or firing into it with the intent mentioned, for it had been already broken, and an attempt had been made to commit a felony in it, and the party still remained in a menacing attitude, and were still firing at him and the house, as well as at Elijah Wright, who had been compelled to flee for his life. In fact, as this record stands, there had been no cessation of the original unlawful purpose of the party or of the effort to carry it out.

Wherefore, the judgment is reversed and cause remanded for a new trial and further proceedings consistent with this opinion.

James M. York and Connolly & Cline for appellant.

P. W. Hardin for appellee.

HARRIS, &c. v. HARRIS, &c.

(Filed January 18, 1887.)

Legitimacy—Issue of void marriage—Where a marriage is void because a former husband or wife was living when the marriage was contracted, the issue of the marriage is legitimate whether or not the marriage was contracted in good faith under the belief that the former husband or wife was dead. The issue of every void marriage is legitimate except as provided in section 3, article 1, chapter 52, General Statutes, section 4 of that article not being intended to make an additional exception.

Appeal from Bullitt Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellants and the appellees are each claiming to be the lawful heirs of John L. Harris, deceased.

Appellants are his brothers and sisters, and the appellees are his children under a marriage prohibited by law, and void by an express provision of the statute.

The court below adjudged in favor of the children, and the brothers and sisters appeal. Their right depends upon the construction given the provisions of the statute on the subject.

By the second section of article 1, chapter 52, General Statutes, similar to the Revised Statutes, "marriage is prohibited and declared void, first, with an idiot or lunatic; second, between a white person and a negro; third, where there is a husband or wife living from whom the person marrying has not been divorced; fourth, when not solemnized or contracted in the presence of an authorized person or society; fifth, when, at the time of marriage, the male is under fourteen or the female is under twelve years of age."

Section 3 of the same article provides that "the issue of an illegal or void marriage shall be legitimate, except the issue of an incestuous marriage. The marriage between a white person and a negro or mulatto shall not be legitimate, and where one of the parties is an idiot or lunatic, the issue shall be legitimate as to both."

The third section contains all the exceptions to be found in the statute on the subject, and, therefore, by reason of section 2 the offspring of all marriages declared void by that section

are legitimate unless within the exceptions mentioned in section 3.

It is, however, under section 4 that the appellants, the brothers and sisters, assert their claim to the estate of the decedent. That section reads (4): "Where the marriage is contracted in good faith, and with the belief of the parties that a former husband or wife then living was dead, the issue of such marriage, born or begotten before notice of the mistake, shall be the legitimate issue of both parties."

The mother of these children (the appellees), whose maiden name was Deacon, married one Smith Ash in August, 1860. The marriage took place in Cincinnati, O., was properly solemnized, and in every respect a legal marriage. She was then only fifteen years of age, and separated from her husband in a short time after the marriage, instituting an action for a divorce against him that was dismissed.

After the dismissal of the suit for a divorce, and while she was the lawful wife of Ash, she entered into a contract of marriage with John T. Harris, the father of these children, that was also consummated at Cincinnati, with all the forms and solemnities of the law, and would have been valid but for the reason that Ash, the husband, was then living, and no divorce had been obtained by either party.

After the marriage with Harris they returned to the neighborhood where Ash lived, and, not long after, Ash, by a proper proceeding, obtained a divorce. These children, eight in number, were born after the divorce was granted. Harris and his wife, if she can be properly called his wife, lived together as man and wife for eighteen or twenty years, and Harris died recognizing that relation, and they were in fact regarded always as man and wife by their friends and neighbors.

Since the adoption of the revised Statutes mere co-habitation and a recognition of the marital relation between parties does not evidence a valid marriage, or make the parties husband and wife. The old common-law rule has been abolished, and the marriage in this State must be in accordance with the

mode prescribed by the statute, and if not the marriage is void. So it is immaterial how long Harris and the mother of these children lived together as man and wife after Ash obtained a divorce from her, as no such facts could establish a valid marriage when the testimony is clear that her husband, Ash, was living at the time, and that fact known to both parties, Harris and Mrs. Ash, when the marriage ceremony was performed between them at Cincinnati.

The last marriage was void from its inception, and so continued up to the death of Harris.

The fact that it was void does not, however, make their children illegitimate, that is, bastardize them so as to make them incapable of inheriting from their parents.

The act of 1797 declared in substance "that the issue in marriage deemed null in law shall nevertheless be legitimate. The act continued in force until the adoption of the Revised Statutes, when certain exceptions to the statute by which such children were made legitimate were inserted. The law of the Revised Statutes is embodied in the General Statutes, and the exceptions are to be found in section 8, already given.

Where a marriage actually takes place, that is, when it is solemnized according to the forms of law, although void as between the parties, their offspring will be deemed legitimate unless they come within the exceptions mentioned: First, the offspring of an incestuous marriage; second, the offspring of a marriage between a white person and a negro or mulatto.

We find no other exception mentioned in the statute, and section 4, relied on by counsel, is meaningless unless its enactment was intended to prevent those who married, under the mistaken belief that their husband or wife was dead, from suffering the penalties of the law imposed in such cases. The framers of the statute, although they had made the children legitimate when the marriage was void, would seem, by the 4th section, to have believed they had omitted something from the statute by which children might be bastardized, and, therefore, said "that where the marriage is contracted in good faith, and

with the belief of the parties that a former husband or wife then living was dead, the issue of such marriage, born or begotten before notice of the mistake, shall be the legitimate issue of both parents. They had already said in a previous section that where one married, having a husband or wife living, when no divorce had been granted, the marriage should be void, but the children legitimate, therefore, there was no reason for the adoption of the 4th section because the state of case had already been provided for; and to construe the 4th section as counsel for appellants contend would render the offspring illegitimate in all cases where their parents, or either of them, at the time of their marriage had a husband or wife living from whom they were not divorced.

They had provided that if a former husband or wife was living the children of the second marriage should be legitimate, and now, by reason of the 4th section, it is argued that they can not inherit unless, at the time of the void marriage, they supposed the first marriage had ended by reason of death. That if there was a mistake as to the death, the children are legitimate up to the time their parents had notice that the first husband or wife was living, and after that they are bastards. Such an absurdity was not intended by the lawmaker, and he was evidently providing for a case that he supposed had been omitted from the 2d and 3d sections, when they really embraced it.

The 4th section does not say that the children begotten after notice to their parents shall be illegitimate, nor does such a result follow because of the general rule of construction, *expressio unius est exclusio alterius*, for the reason that some meaning must be attached to the 2d and 3d sections of the act to accomplish the object in view, which was to legitimize children who would otherwise be deemed bastards. Such was the legislative intent, and we will not imply or infer another exception to the rule by reason of the 4th section. That section was not intended as an exception, but was in fact a declaration

of legitimacy on the part of children in a particular state of case, when the contingency had already been provided for in section 3.

In our opinion these appellees are entitled to the estate of their father, and the judgment below was proper and it is now affirmed.

F. P. Straus and Richards & Hines for appellants.

A. Duvall and Chas. Carroll for appellees.

NATIONAL MUTUAL BENEFIT ASSOCIATION v. MILLER.

(Filed January 27, 1887.)

1. Benefit societies—Notice of assessments—Where the charter of a benefit association provides that any member failing to pay his assessment within thirty days "from the date of notice" shall forfeit his membership, the time within which the payment is to be made, when the notice is sent by mail, is not to be computed from the actual date of the notice, or from the day it was mailed to the members, but from the time at which the notice would, in the regular course of the mail, be received.

In this case notice was sent by mail October 30, and actually received October 31. Payment was tendered December 31. Held—That the tender was too late. The assessment should have been paid November 30.

2. Although "Thanksgiving Days" are made "holidays" by the statute, they are not treated as the Christian Sabbath except as to commercial paper, and where money becomes due on such a day the debtor is in default if he fails to pay on that day.

3. Custom as waiver of forfeiture—The custom of a benefit society to receive assessments after the lapse of the time within which they are required by the charter to be paid does not make it the duty of the society to receive an assessment from a member in default, when his health has become so impaired as to increase the risk when payment is tendered.

Appeal from Louisville Law and Equity Court.

Opinion of the court by Chief Justice Pryor.

In August, 1878, Jesse D. Seaton, being indebted to Miller, the appellee, in a considerable sum of money, became a member of the National Mutual Benefit Association, and named as his beneficiary Miller, to secure him in the indebtedness. After he became a member assessments were made on the deaths of Boes, McDonaugh and Richardson, of which the in-

sured, Seaton, had notice, and no payment having been made it is insisted that Seaton forfeited his membership, and that appellee has no claim upon the company.

On the trial of the case a special verdict or finding of facts was returned into court by the jury, and a judgment rendered for the beneficiary, Miller.

Before proceeding to consider the questions arising from the record it is necessary to notice the objection made by counsel for the company as to one of the findings made by the jury upon an issue not raised by any pleading, and that arises alone from the offer to file an amended answer that was refused, and was made no part of the proceedings in the court below, by a bill of exceptions or otherwise. The object in offering the amended answer was to raise an issue as to the fraud and misrepresentations of the insured as to the condition of his health when the application to become a member was made. While the verdict of the jury in the special findings would indicate that the question was really considered, still, when counsel for the appellee maintained that no such pleading was filed, and none appears in the record, we must assume that this defense was not made, or, if so, there was no pleading upon which any verdict, general or special, could have been based as to the alleged fraud and misrepresentation by the insured, and the question alone arises as to the forfeiture of the policy by the nonpayment of dues.

By the 6th and 7th sections of the charter of appellant it is provided "that any member failing to pay his assessment within thirty days from the date of notice shall forfeit his membership," etc.

The notice to the assured of the death of the members was dated and mailed on the 30th of October, 1882, and the letter received on the 31st of October, 1882, and the tender of the amount due by the assessment was made by the beneficiary, Miller, on the 1st day of December, 1882. It is manifest that the time within which payment is to be made is not to be computed from the actual date of the notice, or from the day it

was mailed to the member, but, when sent by mail, from the time at which the notice would, in the regular mode of carrying the mail, be received by the member.

In this case the notice was actually received on the day after it was mailed, and if payment is to be made within thirty days from the reception of the notice, then, including the day on which the notice was received, which was the 31st of October, 1882, the money should have been paid on the 30th of November, 1882, when it was not offered to be paid until the 1st of December, 1882, and then the company declined to receive the money.

The excuse made by the appellee for not paying the dues or assessments on the 30th of November, 1882, is, first, that it was Thanksgiving Day; second, that it was the custom of the company to receive the assessments after the lapse of thirty days, and to waive the forfeiture in such cases.

The statute in regard to holidays makes "all days appointed by the president of the United States, or by the governor of this Commonwealth, as days of fasting or thanksgiving holidays, on which all the public offices of this Commonwealth may be closed, and shall be treated and considered as Sunday, or the Christian Sabbath, for all purposes regarding the presenting for payment or acceptance, and of protesting for and giving notice of the dishonor of bills of exchange, bank checks and promissory notes, placed by law upon the footing of bills of exchange." If any of those days named "as holidays shall occur on Sunday the next day thereafter shall be observed as holiday, but bills of exchange or other paper may be presented for payment or acceptance on Saturday preceding such holidays, and proceeded on accordingly."

We find nothing in the statute prohibiting business transactions on Thanksgiving Day, or treating that day as the Christian Sabbath, except as to commercial paper, and being a mere privilege extended the citizen, that he may or not exercise, as his judgment dictates, he is required to perform his business engagements on that day if, by the terms of his contract, such is his undertaking.

The office of the insurance company was open on that day, and nothing to prevent the appellee from paying the assessments.

The custom of observing Thanksgiving Day is commendable and proper, but, as said by Justice Grier, in the case of *Richardson v. Goddard*, 23 Howard, 48, "it is but a recommendation; it has not the force of law, nor was it so intended."

Although the statute makes it a holiday, all business transactions on that day, not otherwise illegal, are valid and binding on the parties, and, except as to commercial paper, all payments of money or delivery of property to be made on a day that is afterwards designated by those in authority as Thanksgiving Day must be complied with or the contract is violated.

It is urged, however, that it was the custom of the appellant to receive payments after the lapse of thirty days, and that payments had been made by the appellant on the policy in question, when a forfeiture had already occurred but for this custom on the part of the company.

The obstacle in the way of appellee's recovery by reason of this alleged custom that has, to some extent, been established by the proof, is that when the thirty days had elapsed, and when the money due was tendered by the appellee, the assured was in bad health, and in a condition that would have prevented a renewal of the policy or the waiver of the forfeiture unless by the voluntary action of the company.

When the money was tendered the beneficiary declined to make a statement as to the condition of Seaton's health, and the jury, by a special finding, has said that his health was then bad, therefore, no claim existed on the part of either Miller or Seaton against this company by reason of the custom in regard to receiving assessments.

It can not be said that the company, by reason of its leniency to its members, is compelled to accept the money after the forfeiture, regardless of the member's condition; if so, it would be in effect deciding that no forfeiture could be made after becoming a member of the association. The company may

waive the forfeiture; may waive the right to a medical certificate as to health; but when the member is in default there is nothing in such a custom as will prohibit an inquiry by the company as to the health of the member who desires to take advantage of this custom, and to refuse the money when tendered if the health of the applicant is so much impaired as to increase the risk. That it was greatly impaired is established by the verdict in this case, and, therefore, the company was under no obligation to take the money and reinstate Seaton as a member. There is no excuse on the part of the appellee for a failure to comply with his contract. He had the entire month of November in which to pay the calls upon him, and was notified that the amount was payable on the 29th of that month.

The case of Jones, on the appeal of this company, decided in April, 1886, presents facts entirely different from those appearing in this record. There the money was paid and received by the company after the forfeiture, and not only so, other assessments were made and paid by the assured after that time, and under such circumstances it was held that the forfeiture had been waived and the company estopped to deny that Jones was a member. In the present case the company refused to receive the money, and asserted its right to inquire as to the condition of the health of the assured before doing any act that would estop it from relying on the forfeiture. This it had the right to do, and no custom has been established that would authorize this court in saying that, after default in payment by the member, he could nevertheless claim the benefits of the insurance and continue a member, although his health was such as that no company would undertake the risk of an insurance on his life.

With this view of the case as presented by the special verdict it is not necessary to consider the other questions made.

The judgment is, therefore, reversed, with directions to enter a judgment for the defendant.

Helm & Bruce, Bullitt & Harris and C. S. Shields for appellant.

Simrall & Bodley and F. W. Morancy for appellee.

MANNIKEE'S ADM'X v. BEARD.

(Filed January 11, 1887.)

Transfer by husband in fraud of wife's marital rights—When the husband, in contemplation of death, gives to his children the whole of his personal estate, including his money, choses in action, etc., with the fraudulent intent to deprive his wife of the interest therein to which she would be entitled as his widow, the gift will be set aside at the instance of the widow in so far as it affects her rights, and it is no response to her claim that her dower interest in the land left by her husband is sufficient to support her.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant is the widow and administratrix of Elisha Mannikee, deceased. She was his second wife, and had no children. His first wife was the sister of appellant, and at her death left children.

The deceased husband at his death owned considerable real estate and some personalty. He had, a few days prior to his death, some twelve or fourteen hundred dollars in money and cash notes on persons within his county, amounting in all to near \$2,500, that all seems to have been found in the possession of the appellee, who was a daughter by his first wife. The appellant brought this action as widow and administratrix, claiming that this money and the notes belonged to her intestate, and that she was entitled to it for the purposes of distribution. Besides, that the gift to the daughter, if made, was in fraud of her marital rights, and executed for the express purpose of preventing her from sharing in the distribution.

She also claimed some cattle and hogs that she alleged belonged to her intestate, and asked judgment for their value.

As to the cattle and hogs, we are inclined to adjudge they belonged to the appellee, and were the natural increase of stock she had carried to the father's farm when she moved upon it, and the judgment to that extent will not be disturbed, but as to the money and notes there is more difficulty in sustaining the judgment below.

The intestate was sick for about four weeks, and during this

last illness, and not long prior to his death, he gave to his daughter all the money and cash notes he owned, leaving nothing for distribution but the proceeds of the stock, farming utensils and household furniture. His wife, so far as the proof shows, was kind to her husband, and there was no motive for his conduct, except his purpose that, seems to have been fixed, to prevent his widow from sharing in the distribution.

The appellee says that she accepted the gift with a trust upon it, giving \$500 to her for the education of her son, and \$500 for the education of a son of her sister, and the balance, after paying for a tombstone or monument, the appellee was to have. There was doubtless some ill-feeling on the part of the husband towards his wife, as it is proved that he said the reason he gave the money to his daughter to purchase the monument was that he knew his wife would not expend it in that way. When the wife applied to him for money to purchase beef, etc., for the family, he said he had given it to his daughter, and she would use what was necessary for that purpose. The appellee establishes by other testimony the several trusts set up, and also shows the gift and assignment of the notes, and also shows that one reason assigned for the gift was to make this daughter, the appellee, equal in advancements made to his other daughter.

The right of the father to give his children money and choses in action, as well as goods and chattels, during the life of the wife, or the existence of the marital relation, can not be questioned, but when such gift is made with, and for, the purpose of defrauding the wife, it will be set aside to the extent it may affect her rights as a widow.

The widow was entitled to one-third of the proceeds of the personalty, after the payment of debts, in her own right, and here, in the last illness of the husband, he makes a secret gift of all his money and cash notes to his daughter, not retaining enough in his own possession to provide him with the comforts of life, and says to his wife: "My daughter has the money; she will supply what may be necessary for that purpose."

This was done in accordance with a fixed purpose on his part, previously declared to two or more witnesses, that he intended to so arrange matters as to prevent his wife from sharing in the distribution of his estate, and, as far as he could do so, this purpose seems to have been accomplished.

That one with children should, during a period of years while the marital relation existed, give to his children money, goods or chattels in discharge of his parental obligation to them, so as to affect the marital rights of his widow at his death, would be no cause for presuming fraud or disturbing the gifts; but where the husband makes known his purpose to dispose of his money, choses in action, etc., with the design to defraud the wife, and in his last illness, in the absence of his wife and in contemplation of death, give the whole of his personalty, including his money, choses in action, etc., to his children, the chancellor will not long hesitate in restoring to the widow the rights of which she has been fraudulently deprived. That the husband owned land, and the dower interest was sufficient to support the wife, is no response to this claim by his widow. She was entitled to one-third of this money and the cash notes, and the appellee must account for it. The trust, however, should be enforced, as the widow has no interest in that fund.

The debts seem all to have been paid. Now the chancellor will ascertain the amount of money received by the appellee, the amount of the cash notes received and collected, or that are solvent, and will then give to the widow the one-third of the amount, with interest from the filing of this petition. He will then set apart to the son of the appellee \$500 out of the fund, and to the son of the other daughter \$500, and this money will be paid over to a trustee, to be applied as the intestate directed. Each one of the distributees should account for his portion of the cost of the monument, the widow contributing an equal sum with the others, and deducted from her claim. This leaves the settlement as made by the widow undisturbed, and the two funds can be distributed without mingling the one with the other.

The judgment below is reversed and cause remanded for proceedings consistent with this opinion.

The parties for whom the trust was created in this case were not parties to the fraud upon the widow, and, therefore, should not be held to share the losses with those perpetrating it.

The children, who are all parties, appellees here, are not liable for the costs, and no execution will be awarded against them.

E. E. McKay for appellant.

Wm. Johnson for appellee.

BEAN, &c. v. HOFFENDORFER BROS.

(Filed January 8, 1887.)

1. Service of summons—Under Myers' Code it was only in case the defendant had been judicially found to be of unsound mind, or was confined in a State lunatic asylum, that the service of summons was required to be upon his committee or other person, as well as upon him.

2. New trial—Persons of unsound mind—That the defendant was of unsound mind, and, therefore, incompetent to make an intelligent defense to the action is such a "misfortune" within the meaning of section 579 of Myers' Code as will authorize the court to vacate or modify a judgment.

In this action by the heirs of a defendant, whose property was sold under decree at a great sacrifice, the judgment under which the sale was made is vacated, the sale set aside and the title restored, the defendant being of unsound mind when summons was served on him, and continuing so until the time of his death.

3. A return upon a summons signed by one as "deputy sheriff," without the name of his principal, is sufficient evidence of service.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

In 1874 Thomasson & Hider, street contractors, holding certain apportionment warrants issued by ordinance of the general council of the city of Louisville for improving Broadway street against the owners of adjacent property, instituted an action in the Louisville Chancery Court to enforce the lien provided for in such cases by the city charter; and amongst others made defendants was Isaac Smith, now deceased, who

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owned a lot of land on each side of the improved portion of the street, the aggregate amount apportioned against him being the sum of \$13.43.

In October, 1878, judgment was rendered in that action for a sale of the two lots to pay the sum mentioned, together with interest at the annual rate of 10 per cent. and costs, and in July, 1879, the sale was made, appellees, Hoffendorfer Bros., becoming the purchasers of both lots at the price of \$73.

September 19, 1879, the sale was confirmed by the court, and, as provided in such cases, the right was reserved to the defendant to redeem the property within three years by paying the purchase price, with interest at the rate of 10 per cent., and all taxes accrued. But Isaac Smith died September 17, 1882, a few days before the expiration of the time given, without redeeming; and in December following the court made an order directing a deed to be executed to the purchasers, but it was not done until March, 1883.

This action was brought by the heirs at law of Isaac Smith, in October, 1883, and in their petition they pray that the judgment and proceedings in the action by Thomasson & Hider be declared null and void as they related to Isaac Smith and his land; that the deed made to the defendants, Hoffendorfer, be set aside, and the title of the plaintiffs to the two lots be quieted.

The defendants in their answer, made a counterclaim, deny the material averments of the petition, and ask that the plaintiff be required, by order of court, to quit-claim and convey to them all their (the plaintiffs') right and title to the property.

It is alleged in the petition, and satisfactorily proved, that when the summons in that action was served on Isaac Smith in Bullitt county, where he resided, he was, and had been for several years and continued to his death, of unsound mind, by reason of a fracture of his skull, and was mentally incapable of understanding and transacting business; that none of the plaintiffs knew he was the owner of the lots in question until after his death, when they discovered amongst his papers a deed therefor, made to him many years previously. Nor did

any of them know the action by Thomasson & Hider had been brought against him, or that the lots had been sold until a few days before the commencement of this action. It further appears that the two lots are now, and were when purchased by appellees, worth between twelve and fifteen hundred dollars.

It is shown, and relied on as a ground for reversal, that the apportionment warrants upon which the action by Thomasson & Hider against Isaac Smith was based, were not, in fact, issued against him, but against L. H. Smith. This manifestly was the result of a mistake by the officer whose duty it was to issue the warrants, for it is not pretended that any other person than Isaac Smith was, or could have been, made liable for the assessment of the two lots in question.

It is alleged in the petition that the judgment was procured by the fraud of the plaintiffs in that action. But there is no positive evidence they knew of the mental condition of Isaac Smith before the judgment was rendered, nor is there any fact proved tending to establish fraud, unless it be the unexplained increase of the claim against him from the original sum of \$18.43 to \$73, the amount for which the two lots were sold.

We do not think there is any reason to doubt that a summons was issued in that action and executed on Isaac Smith in Bullitt county, for the return on the summons by the deputy sheriff, as has been repeatedly held by this court, is sufficient evidence of the service.

Under Myers' Code, in force at the time, it was only in case the defendant had been judicially found to be of unsound mind, or was confined in a State lunatic asylum, neither of which was the case with Isaac Smith, that the service of a summons was required to be upon his committee, or any other person, as well as upon him. It would seem, therefore, that the judgment could not be regarded as void because the defendant was not before the court by service of summons at the time it was rendered.

But the fact exists, nevertheless, that he was just as unconscious of the pendency of that action as if he never had been summoned, and as utterly incompetent to make an intelligent

defense to it, or to prevent the ruinous sacrifice of the two lots when sold, as if he had been a helpless infant, though it is proved that he was at the time the owner of personal property sufficient to pay many times the assessment against him.

As the complete record of the action by Thomasson & Hider is not before us showing the contrary, and they are not parties to this action, we must assume the validity of the judgment for the sale, and that appellees acquired the property in question according to the forms of law. But, on the other hand, neither appellants nor Isaac Smith, under whom they claim, are chargeable with laches or other fault.

Appellees have, and claim the right to hold, property worth now, and worth when they purchased it, more than fifteen times what they paid for it. Are the heirs at law of the lunatic, from whom it was thus acquired, utterly without remedy? We think not.

It is provided in section 579, and subsections 5 and 7 thereof, Myers' Code, as follows: "The court in which a judgment or final order has been rendered or made shall have power, after the expiration of the term, to vacate or modify such judgment or order. * * * Fifth. For erroneous proceedings against an infant, married woman, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings. * * * Seventh. For unavoidable casualty or misfortune, preventing the party from appearing or defending."

There is enough before us in this case to show that the mental condition of Isaac Smith does not appear in the record of the action of Thomasson & Hider against him. But unless the failure of the court to appoint some one to defend for him in that action be an error in the meaning of subsection 5, there was none up to the rendition of the judgment, for there is nothing before us to satisfactorily show that the claim of the plaintiffs in that action was unjust, or that a successful defense could have been made to it. But unavoidable casualty and misfortune preventing appearance and defense have always

been held by courts of equity sufficient grounds for not merely setting aside sales of property under judgment when great wrong has been done, but for setting aside the judgment and permitting the defendant to answer when he has a good defense, and makes application in proper time.

Mere inadequacy of price, as has been frequently held by this court, is not alone sufficient to set aside a judicial sale. But when the price bid is greatly disproportioned to the actual value of the property, only slight additional circumstances are required to justify and make it the duty of the chancellor to set it aside. And when there is any fact connected with the sale from which fraud may be presumed, or when the defendant, by casualty or misfortune, has been prevented from appearing in the action, or taking steps to avoid a sacrifice of his property, it should be set aside.

While it is generally as necessary for the protection of the defendant as of the purchaser, and, therefore, the policy of the law to uphold judicial sales when fairly and legally made, it would be making such sales the means of oppression and wrong to sanction an unconscientious advantage obtained by a purchaser by reason of the misfortune of the defendant.

It seems to us this is clearly a case contemplated by the Code, for there could be no misfortune more likely to result in the sacrifice of a defendant's property than unsoundness of mind.

In *Yowell v. Gains*, 2 Bush, 211, when, in a proceeding against a defendant, absent from the State through fear of his life, his property was sold at an enormous sacrifice, the sale confirmed and the purchaser put in possession, it was held by this court that the sale should be set aside upon the ground that "inevitable accident or misfortune" prevented the defendant from objecting to the report of sale sooner or otherwise than by the petition.

In our opinion, if subsection 7 does not apply to a case like this, it can have no application at all, and it must follow that a purchaser at a judicial sale having once acquired the title to

the property, at whatever sacrifice, can hold it, although the defendant may, by reason of unsoundness of mind, have been ignorant of the claim, as well as of the action, against him, and incapable of being present at the sale, or of devising any means to prevent a sacrifice of his property.

Unquestionably if Isaac Smith, or any one for him, had filed exceptions to the report of sale in this case they would have been sustained. But by reason of misfortune of a character clearly comprehended by the Code, he was prevented from doing so, as well as from redeeming the land, which, it is shown, he had the means to do.

The advantage appellees seek to retain is an unconscientious one, obtained by the misfortune of Isaac Smith, and as it is in the power of the chancellor to restore the title of the two lots to appellants, without necessary loss to appellees, it should be done.

The judgment dismissing the petition is, therefore, reversed and cause remanded, with directions to give to appellants a reasonable time in which to redeem the property upon the terms prescribed in the judgment confirming the sale, and for further proceedings consistent with this opinion.

To a petition for rehearing Judge Lewis delivered the response of the court:

It was not intended by section 521 of the Code (Myers' Code, 582) to make the power of the court to vacate, after the expiration of the term, an order confirming a judicial sale dependent upon the existence of a valid defense to the cause of action or claim sued on. If it had been, no sale of real property under a valid judgment could, after confirmation, be set aside for any cause, however unjust, unfair, or even fraudulent, it might be.

The question as to the validity of the sale is distinct from that in regard to the judgment under which it is made, for, though the judgment be reversed or vacated, it does not necessarily follow that the sale, if already confirmed, will be set aside. And, on the other hand, there may exist grounds for setting aside a sale which do not affect the judgment.

If, then, Isaac Smith, or any one for him, could, being present, have presented a valid defense to the motion to confirm the report of sale, his heirs at law may, for the cause mentioned in subsection 7, section 518, now make the same defense, without calling in question the judgment for the sale.

His defense would have been that the two lots were sold at an enormous sacrifice, for much less than the value of either of them, and that, by reason of his unsoundness of mind, he was ignorant of the pendency of the action against him, of the judgment, and of the sale. And if such defense had been made the court would undoubtedly have set aside the sale. But it is argued that when time is allowed to redeem, inadequacy of price is no ground of exception to a judicial sale.

Even if that rule were correct, it could not be applied in every case without working injustice, for there may be a case where the defendant is unable to redeem, and consequently interested in having the property sold for a fair price, or a case like this, where two lots of land are improperly sold, when either of them may be worth, and at a fair sale would bring, more than enough to satisfy the judgment, leaving the other unencumbered.

Though appellants in their petition did not, in terms, pray to have the order confirming the sale vacated, they did ask that the judgment in the original action and all the proceedings under it be declared void; that the deed to appellees be cancelled, and the title and possession of the property be restored to them, and they stated all the facts necessary to constitute the cause mentioned in subsection 7 for setting aside the sale.

The plaintiffs in the original action were not made parties to this, consequently the only issue made is with appellees, and the only relief sought, or that can be granted, is against them, which involves vacating the order confirming the sale, and cancelling the deed and restoration of the title upon the conditions mentioned in the original opinion.

Petition overruled.

D. M. Rodman, J. R. M. Polk and F. P. Straus for appellants.
Lane & Burnett for appellees.

UNGER v. BAMBERGER.

(Filed January 8, 1887.)

1. Landlord and tenant—Holding over—The mere holding over by the tenant, where there is a renting to expire at the end of the year, will not make him a tenant for another year unless the holding is for a greater period than ninety days from the expiration of the term without proceedings to remove him, but he may obtain the right to hold another year by contract with his landlord.

In this case where there was a renting from year to year, the rent payable monthly, the tenant had entered upon his fourth year and paid one months' rent in that year when the landlord instituted this proceeding to remove him. The proof shows that the contract was that when the tenant started out in one year he became a renter for that year. Held—That the tenant had the right to hold another year, and was entitled to a peremptory instruction.

2. The landlord having sold the rented premises his vendee occupies no better position with reference to the tenant than the landlord occupied.

Appeal from Jefferson Court of Common Pleas.

Opinion of the court by Chief Justice Pryor.

This is a controversy between landlord and tenant by a writ of forcible detainer, under which an eviction was had. The tenant claims that he was holding as a tenant from year to year, and the term of one year having expired without notice to quit, the holding over entitled him to the use and possession for another year. Again, the tenant says that he was holding over and entitled to the possession for another year under a contract made with his landlord. Article 49 of chapter 66, General Statutes, provides that "if by contract a term or tenacy for a year or more is to expire on a certain day, the tenant shall abandon the premises on that day, unless by express contract he secures the right to remain longer." It is further provided that if he holds over without such contract, proceedings may be had to evict him within ninety days after the term of renting expires; but if proceedings are not had within that time, then he can hold for one year longer from the time the tenancy expired.

We think it doubtful, from the testimony introduced by the appellee, whether any contract was entered into by which the renting was, for a year or more, to expire on a certain day.

The tenant entered, renting for one year with the privilege of two, and after that he rented for another year with the understanding that he was to have the rented property, according to the testimony of the appellee, until his landlord wanted it; but assuming, as both parties contend, that it was a renting from year to year, the rent to expire on the 1st of May, each year, the rent payable monthly, then it is plainly proven by the witness for the appellant that when he started out in one year he became a renter for that year, and such he understood to be the terms of the contract.

This fact is also clearly established by Unger, the testimony on both sides conducing to show such a contract, and we think the testimony of the appellee is as conclusive as to this matter, if not more so, than that of the appellant. The appellant had not only entered upon his fourth year, but had actually paid the rent to his landlord, who had sold the house and lot to the appellee. The mere holding over, where there is a renting to expire at the end of the year, will not make the party in possession a tenant for another year unless the holding is for a greater period than ninety days from the expiration of his term, without proceedings to remove him; but he may obtain the right to hold another year by contract with his landlord; and in this case the payment of one month's rent in the last year, after the third year had expired, is persuasive evidence of the existence of such a contract; but in addition to that the testimony conduces clearly to show a contract by which the tenant had the right to hold another year. The sale by the landlord to the appellee placed the latter in no better condition, with reference to the tenant, than the landlord occupied.

In our opinion, from the proof of appellee, the peremptory instruction should have been given. The judgment is reversed and cause remanded for proceedings consistent with this opinion.

Goodloe & Roberts and Ernest Macpherson for appellant.

M. A. & D. A. Sachs for appellee.

SHINE v. KENTUCKY CENTRAL R. R. CO.

(Filed February 10, 1887.)

1. While mandamus will lie to set a court in motion, it can not be used to control the result. It may compel the trial of an issue, but not how it shall be tried.

2. Mandamus will not lie where the party has any other adequate remedy, such as the right of appeal.

3. Case adjudged—The judge of the county court having dismissed a proceeding by appellee for the condemnation of land for railway purposes, upon the ground that appellee had no right to sue, appellee seeks to compel him, by mandamus, to impanel a jury to try the issues of fact raised by exceptions to the commissioner's report as to damages, etc. Held—That mandamus will not lie, as the county judge was not required to defer the exercise of his judgment as to the right of the appellee to maintain the proceedings until a jury had passed upon the issues of fact. Moreover, appellee had the right of appeal to the circuit court, although the issues of fact had not been passed upon by a jury.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Holt.

The appellee, the Kentucky Central Railroad Co., filed its petition in the Kenton County Court against one Alonzo Graves, under the law providing for the condemnation of land for railway purposes. (Acts of 1881, volume 1, page 83.)

It provides that this may be done when the property is necessary for such use and can not be obtained by contract with the owner; also that commissioners shall be appointed to award to the owner the value of the land and damages, if any; and upon the filing of the report he is to be summoned to show cause, if he have any, against its confirmation; and if exceptions to it are filed "the court shall forthwith cause a jury to be empaneled to try the issues of fact" made thereby.

In this instance the petition avers that the condemnation of the property is necessary for the extension of the railroad from its then terminus, in the city of Covington, to the Ohio river; and that it had endeavored to contract with Graves for it, but had been unable to do so. The answer puts all this in issue, save that no agreement of purchase had been made, and states

affirmatively that the land could be obtained by a contract at a fair price; also that the appellee had no right to maintain the proceeding, as its road had, by a decree of the Federal court, been placed in the hands of a receiver.

The necessary commissioner's report was filed, fixing the value of the property and the resulting damages, and exceptions having been filed to it the appellee moved the court to empanel a jury to try the issues thus formed, while Graves, who had filed an exhibit showing the appointment of the receiver, moved the court to dismiss the proceeding upon the ground that the appellee had no right to sue. The first motion was overruled and the last one sustained, the judgment allowing Graves his costs.

This proceeding was then filed in the Kenton Circuit Court by the appellee against the appellant, judge of the Kenton County Court, to compel him, by mandamus, to empanel a jury and try the case which he had dismissed. It is urged upon behalf of the appellee that the dismissal was in effect a refusal to proceed further with the case, and that, as is true, there need not be a direct refusal to do so to authorize the writ, but that it is sufficient if such circumstances appear as satisfy the court that such was the intention. Various reasons were presented by the answer why the mandamus should not issue. We shall notice but two of them. Section 477 of the Civil Code provides:

"The writ of mandamus, as treated of in this chapter, is an order of a court of competent and original jurisdiction commanding an executive or ministerial officer to perform an act or omit to do an act, the performance or omission of which is enjoined by law." This provision relates only to the acts or omissions of ministerial officers vested with no discretion, and does not restrict the issual of the writ to them. True, courts will not interfere with the exercise of discretionary power, but where an officer or inferior judicial tribunal vested with it refuses to exercise it at all or act in any manner, they will, by mandamus, set him or it in motion without, however, control-

ling the direction. The judgment in such a case must be left free to act and reach such a result as it deems proper. Thus, mandamus will lie to compel a judge to act upon a bill of exceptions, or to receive a verdict, or to try a cause, or to hold a court. If this were not so a denial of justice would result. (Clark v. McKenzie, &c., 7 Bush, 523; Commonwealth, &c. v. Boone County Court, 6 Ky. Law Rep., 755.) In this instance, however, the writ should have been refused for two reasons at least.

Unquestionably the action of the county court was judicial. It did not refuse to act. It did act, as shown by the copy of its orders filed with the petition, and dismissed the proceeding upon the ground that the appellee could not maintain it owing to the appointment of the receiver. It is unnecessary to decide whether the ruling was correct or not. The right of the appellee to maintain the proceeding was a question presented to the county court by the record for its decision. It exercised its judgment and dismissed it because it was of the opinion that the appellee had no such power. It reached this conclusion in the exercise of its discretion, and while mandamus will lie to set a court in motion, it can not be used to control the result. It may compel the trial of an issue, but not how it shall be tried. (High on Extraordinary Remedies, section 24) If so, new trials could in effect be thus obtained, and this writ can not be used for such a purpose. The inferior court must be left free to exercise its own judgment, and the opinion of another tribunal can not be substituted for it. (Goheen v. Myers, 18 B. Monroe, 426; Clark v. McKenzie, &c., 7 Bush, 528.)

The county court was not required to defer the exercise of its judgment as to the right of the appellee to maintain the proceeding until a jury had passed upon the issues raised by the exceptions. Indeed it was proper that it should not do so. If this were required it would often result in useless trouble and expense to the parties. Take the case of the condemnation of land for a road. The viewers file their report, and we will suppose that it is excepted to because they were not sworn,

or were not qualified, or because the report does not describe the route. Certainly a writ of *ad quod damnum* should not issue until all such preliminary questions are settled. Again, a party has a right to demand a jury in certain cases; and as well might it be held that they must pass upon the issues of fact presented, although there may be many reasons, such as incapacity to sue, etc., why the court must dismiss the action.

It results that the demurrer to the petition should have been sustained for the reason above indicated. There is another reason, however, why mandamus will not lie in this instance.

The appellee had a right to appeal. The sixth section of the act of April 11, 1882 (cited *supra*), provides:

"Either party may appear to the circuit court, or other court of similar jurisdiction of the county, within thirty days, and the appeal shall be tried *de novo*."

This right existed whether a jury determined the issues of fact or whether the court dismissed the proceeding upon a legal issue. An appeal is from the judgment of a court and not the verdict of a jury. If an inferior court dismisses a warrant or an action without a trial upon the merits or the intervention of a jury in a case where one is allowable, yet the party may appeal and have the action tried *de novo*. Here the commissioners had filed their report as to the value of the land and the damages, and the record was complete for such a purpose. Mr. High, in his work above cited, section 177, says: "In all cases where full and ample relief may be had, either by appeal, writ of error or otherwise, from the judgment, decree or order of the subordinate court, mandamus will not lie, since the courts will not permit the functions of an appeal or writ of error to be usurped by the writ of mandamus. Indeed the interference in such cases would, if tolerated, speedily absorb the entire time of appellate tribunals in revising and superintending the proceedings of inferior courts, and the embarrassment and delay of litigation would soon become insupportable were the jurisdiction by mandamus sustained in cases.

properly falling within the appellate powers of the higher courts. It may, therefore, be laid down as the universal rule, prevailing in both England and America, that the existence of another remedy, adequate to correct the action of the inferior court, will prevent relief by mandamus." (Goheen v. Myers, *supra*.)

It is too well settled to need the citation of further authority that mandams will not lie where the party has any other adequate remedy, such as the right of appeal, to correct the supposed grievance.

The judgment is reversed, with directions to sustain the demurrer to the petition and dismiss the action with a judgment for the appellant's cost.

Collins & Fenley for appellant.

Hallam & Myers for appellee.

HERBERT'S GD'N, &c. v. HERBERT'S EX'OR, &c.

(Filed January 29, 1887.)

1. Devise for life with power of appointment—Where a testator devises land to a stranger for life, with power to devise the estate to whomsoever he pleases, making no disposition of the remainder, the remainder passes to the heir at law of the testator, subject to be defeated by the execution of the power, but where such a devise is made to the heir at law, the life estate and the fee in remainder being united in one person, he takes the absolute estate, and being already vested with the fee without reference to the power to devise, that power gives him no greater right than he already had.

H. devised his estate to S., his son, and to G., a stranger, for life, the income to be equally divided between them, and gave to each full power to devise to whomsoever he pleased the share of the estate devised to him for life, but made no disposition of the remainder in the event either of the devisees for life failed to execute the power of appointment. S. and G., the devisees for life, with the testator's widow, were appointed and qualified as executors. S., after consuming that part of the estate devised to him, died, leaving a will by which he devised all of his estate, real and personal, to his widow and to his only child. The devisees of S. seek to make his co-executors account to them for one-half of the estate of H., claiming that the devise to them by S. was an exercise of the power conferred upon him by his father's will, and that they take one half of the estate under the will of H.,

having been designated as the persons to take; or, that if the power has never been executed, the title to the estate upon the death of S. vested in his son as heir of H. Held—That the absolute fee to one-half of the estate of H. passed to S., and the fee in remainder to the other half, subject to be defeated by the exercise by G. of the power of appointment, vested in her; and even if the will of S. is to be deemed an exercise of the power of appointment vested in him, he can not, after consuming the estate devised to him, as he had the right to do, make his co-executors responsible by devising the estate to another, even though the attempt to execute the power be binding on his executor, or those entitled to hold under him.

2. Exercise of power of appointment—Under our statute, where one having a power of appointment to be exercised by last will, devises his whole estate to a person whom, in his discretion, he has the right to designate, the devise will be regarded as the execution of the power, although the power given may not be mentioned or referred to, unless a contrary intention appears from the will. It is not necessary to determine in this case whether or not the testator intended to execute the power of appointment vested in him.

Appeal from Louisville Chancery Court.

Opinion of the court by Chief Justice Pryor.

George W. Herbert, Sr., died in the county of Jefferson, leaving a last will and testament, dated on the 1st of March, 1872. He left his widow surviving him and one child, a son, named Sidney Herbert. He was the owner of valuable real and personal estate at the time of his death, his money, bonds and stocks on hand exceeding in value \$60,000. By his last will he made ample provision for his widow, and gave to his son Sidney, and to Georgiana Wright, who was a daughter of his wife by a former husband, an equal interest in the income and profits of his entire estate during their natural lives, with the power given to each to dispose of "their part of the estate by will forever to whomsoever they might wish. I wish them to have the same right to bequeath their part of the estate by will as I now have."

He appointed his widow, Sidney Herbert and Georgiana Wright executors of his will, all of whom seem to have qualified.

Sidney Herbert died, leaving his widow surviving him, and also his son, George W. Herbert, Jr. He also left a last will, by which he devised his estate to his widow and son George.

His widow afterwards married Monsch, and she and her husband are parties to this litigation. They and George W. Herbert, Jr., are the appellants on this appeal.

After the death of the first testator, George W. Herbert, much of his personal estate was wasted, as is alleged, by his executor, Sidney Herbert, and the entire personalty appropriated by the executors, and this action was brought by George Herbert, Jr., and his mother to make the surviving executors, the widow of the first testator and Georgiana Wright, account to them for the estate, or so much of it as amounted to the share of Sidney Herbert for life, insisting, first, that the devise made to them by Sidney Herbert was an exercise of the power conferred upon Sidney by the will of his father, and that they took one-half of the estate under the will of George W. Herbert, Sr., they having been designated as the persons to take by the donee of the power. Second, that if the power under the will to dispose of the estate had never been exercised, the title to the estate (or his father's share) vested in George Herbert, Jr., at the death of his father, he being the only person living at that time entitled, under the law of descent, to inherit from his grandfather; that the fee or title was in abeyance, waiting for the donee of the power to designate some one to take it, and the death of his father rendering it impossible to execute the power, the inheritance at once passed to him; that at no previous time could the fee have vested.

For the appellees it is contended that at the death of the testator, George W. Herbert, Sr., the absolute fee vested in Sidney Herbert as to one-half the estate, subject to the devise made to the widow of the testator; that the devise to him of the rents and profits for life of the one-half of the estate vested in him the title to that extent by virtue of the will, and the remainder being undevised, he took it by inheritance from his father; that he was also vested with the fee in remainder to the share devised to Georgiana, the fee subject to be divested by Georgiana executing the power of disposition given her

under the will. These are the only questions presented that we deem necessary to consider.

It is proper to give in full, first, the will of George W. Herbert, and also that of his son Sidney.

The will of George W. Herbert is as follows:

"I, George W. Herbert, of the city of Louisville, county of Jefferson and State of Kentucky, being of sound and disposing mind, memory and understanding, do this day, the 1st day of March, in the year of our Lord one thousand eight hundred and seventy-two (March 1, 1872), make, publish and declare this to be my last will and testament, hereby revoking and making null and void all former writings of the nature of last wills and testaments by me heretofore made. My will is, first, that all my just debts and funeral expenses shall be paid. The residue of my estate, both real and personal, of all and whatever kind, which is not required for the payment of debts, funeral expenses, and the expenses attending the execution of this my will, and administration of my estate, and what I may hereafter bequeath, I give and dispose of as follows, to wit:

"I bequeath out of my estate \$1,000 to Elijah Wright (my wife's son), to be paid him, and to him only, in two installments, \$500 first, and \$500 one year afterward. I give and devise to my beloved wife, Mary Anne, all my household furniture and moveables of every kind, and one-third of the net income of my estate from all sources yearly, for her own use and benefit during the term of her natural life; and after her decease the said income is to go to or revert to the estate to be bequeathed as hereinafter mentioned, to wit: To Georgiana Anne Wright (my wife's daughter) and to Sidney G. Herbert (my son) I give and devise the remaining two-thirds of the net income of my estate, each one to have an equal share, or one-third of said net income; and at the decease of my beloved wife, Mary Anne, I also give and devise the one-third part of the income that my wife had received up to the time of her decease, to be thereafter, and from that time, paid to them, namely, to

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Georgiana Anne Wright and Sidney G. Herbert, each to have an equal part of said net income as nearly as can be done; and further, after the decease of my beloved wife, but not before, the two children before mentioned may, if they so choose, have the estate equally divided, so that each one may receive as nearly as practicable the same amount of income. My will is that the income shall only be paid to or received by said children, Georgiana Anne Wright and Sidney G. Herbert, for their use and benefit during their natural lives; but my will and wish is that each one of said children shall have the right to give and bequeath their part of the estate by will forever to whomsoever they may wish, and in such manner as they may wish lawfully. I wish them to have the same right to bequeath their part of the estate by will as I now have. I also give, devise and bequeath, out of my estate, the house and lot on Twelfth street, between Broadway and Magazine, to my beloved nephew, Thomas G. Truman, the same house and lot on which he now resides, in fee simple. I hereby appoint my beloved wife, Mary Anne, as my executrix, and also Georgiana Anne Wright and Sidney G. Herbert (our children) as joint executors or administrators to carry out the provisions of this my will, and request that they may be allowed to administer to my estate and to execute this my will without being required to give any security whatever.

"GEORGE W. HERBERT."

The will of Sidney Herbert reads:

"In the name of God, amen.

"I, Sidney G. Herbert, of the city of Louisville, county of Jefferson, State of Kentucky, being of sound mind and disposing memory, do make, ordain and publish this, my last will and testament, and hereby revoke all other wills and testaments made heretofore by me.

"1st. After all my just debts, funeral expenses and a suitable tombstone are paid for, I then bequeath and give the remainder of my property, both real and personal, to the following:

"2d. I give and bequeath to my beloved wife, Mary Alice

Herbert, two-thirds of all my property, both real and personal, of which I may die seized.

"3d. I give and bequeath to my beloved son, George Wright Herbert, the remaining one-third of all my property, both real and personal, of which I may die seized; I further give and bequeath to him my watch and chain.

"4th. And my further wish is that, if my wife, Mary Alice Herbert, should marry after my death, then the said two-thirds that she was to receive is to go to my beloved son, George Wright Herbert, at her death, and she shall give security, to be approved by the county court, at the time she re-marries, for the payment of the same to my said son, or his heirs, at her death. I appoint as my executor of this, my last will and testament, my beloved friend, T. G. Truman, without security. Given under my hand and seal this 29th day of May, 1879.

"SID G. HERBERT."

The questions presented by the pleadings are readily understood, but rather difficult of solution.

It is argued by counsel for the appellants that the testator, George Herbert, left no part of his estate undevised, and he relies on the following provisions of the will, in connection with the particular devise to each devisee, as sustaining this view. After directing the payment of his debts he says: "The residue of my estate, both real and personal, of all and whatever kind, which is not required for the payment of debts, etc., I give and dispose of as follows." He then proceeds to give to his widow certain personal property, and one-third of the net income of his estate yearly, from all sources, for her own benefit during her natural life, and then to give to Georgiana Wright (his wife's daughter) and to his son, Sidney, each one-third of the net income of his estate, and in the event of his wife's death they are entitled, in equal shares, to the entire income, "for their use and benefit during their natural lives." There is no devise over to the child or children of either of these devisees.

Neither of the appellants, nor any one else, took any interest

in the devisor's estate, except those mentioned in the will, who were entitled to certain specific devises, about which there is no controversy. A life estate had been carved out by the testator, but no disposition made of the remainder. In whom then did the title to this remainder pass at the death of the testator? A naked power of disposition by last will and testament was conferred upon the two devisees, under which they were given the right to devise this remainder interest to any one they might wish to have it, "with the same right to bequeath their part of the estate by will as I now have."

It can not be assumed, in the absence of any provision of the will on the subject, that the purpose was to give this estate in remainder to his next of kin or to the children of the life tenant; but, on the contrary, each one of the devisees for life is invested with the power to devise the estate to a stranger, if such was their desire. The effort on the part of the testator seems to have been to limit the interest of the two principal devisees to an estate for life, and at the same time to give them complete control over it. They are made the executors without bond or surety, and with the power to dispose of it by will, uncontrolled by any direction or desire on the part of the devisor. Regarding the devise as one for life, with the power of appointment merely, and then at the death of the testator the remainder, being undevised, passed to his heirs at law. This was always, as we understand, the common-law rule with regard to executory devises, and Mr. Fearne's contention was that the same rule applied to grants or conveyances. It is here endeavored to be maintained by counsel for the appellants, in an argument able and persuasive, that the fee or title in remainder was in abeyance during the continuance of the life estate, or until the donee of the power designated the one to take the estate. Mr. Kent says that a state of abeyance was always odious, and never admitted but from necessity, but that the existence of such a technical rule as a fee in abeyance can not be doubted. (Kent's Commentaries, volume 4, page

259.) A conveyance to A for life, and at his death to the heirs of B, then living—Mr. Fearne says in such a case the inheritance remains in the grantor, and the transition of the title is in abeyance, that is, can not pass, because the heirs living at the death of the life tenant can not be ascertained until that contingency happens, and the title must remain in the grantor, for there is no one to receive it from him. Whether the transition of the title or the title itself is in abeyance is not important in this controversy, but that the technical rule is recognized by many of the courts of this country, as it existed at common law, is certain. In regard to executory devises the fee, says Mr. Kent, remains unaffected by the will, where the devisee takes upon a contingency. The title is in the heir, subject to be defeated when the devise takes effect. (Kent's Commentaries, volume 4, page 257.)

In *Carter v. Barnadiston*, 1 P. Wms., 505, it was held "that the inheritance descended to the heir in the case of a contingent remainder created by the will, to await the happening of a contingency."

Says Chancellor Kent: "If a contingent remainder be created in conveyances by way of use, or in dispositions by will, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor or his heirs, or descendants of the heirs of the testator, to remain until the contingency happens. This general and equitable principle is of acknowledged authority." (Kent's Commentaries, volume, 4 page 257; also note to Sharswood's Blackstone's Commentaries, volume 1, book 2, page 106.)

It is, therefore, plain in this case, there being no devise of the remainder interest, that the title in fee passed to Sidney Herbert, the only child of the testator, to the one-half of the estate from which he derived the rents and income for the life under his father's will, and that he was invested with the fee to the half devised to Georgiana Wright, and that interest descended to his son, George W. Herbert, Jr., subject to be defeated by the execution of the power on the part of Georgiana.

The latter was not invested with the fee because she was not a child of the testator, and could not inherit from him.

It is claimed that Sidney Herbert, the father and husband of these appellants, exercised the power given him by his father's will in making his last will and testament, by which he devised his entire estate to the present appellants. They are not claiming any part of the property in controversy under this will of Sidney Herbert, but are claiming to hold under the will of George W. Herbert, the first testator, because the power to appoint was derived from the will of the latter, and they being designated as the appointees take under the will of their grandfather by reason of the appointment, and not under the will of their immediate ancestor. That the devise is to the one Sidney should appoint.

The exercise of the power, if it has been attempted by the will of Sidney Herbert, would certainly not have been good at common law, because it nowhere appears from the face of that paper that such was his purpose. This doctrine has been modified by our statute, that provides as follows:

“A devise or bequest shall extend to any real or personal estate over which the testator has a discretionary power of appointment, and to which it would apply if the estate was his own property, and shall operate as an execution of such power, unless a contrary intention shall appear from the will.” (General Statutes, chapter 113, section 22.) This provision of the statute evidently means that where the power of appointment is given, to be exercised by a last will, and there is a devise of the testator's whole estate to the person who, in the testator's discretion, he has the right to designate, the person thus designated will take under the devise, and the same shall be regarded as the execution of the power, although the power given may not be mentioned or referred to. Without discussing the phraseology of the will in question, to show the intent of Sidney Herbert, it is manifest, after what has been already said, that his will, if an attempt to execute the power could not affect the surviving executors, or the right of the appellees

as devisees of George W. Herbert to their interest in the estate; nor are they liable if the estate, or that share of it descending to Sidney Herbert, has been consumed or disposed of by him. The executor of the will of his father, and the heir at law of the undevise'd estate, he became the absolute owner, and while the owner in fee disposes of the estate, and then attempts to vest some one else with title.

If he had died without executing a will the estate would have passed by descent from him to his son George, the present appellant. He has a life estate under the will, with the fee in remainder by descent from his father, coupled with a mere naked power to make what disposition of the estate by last will he pleases. After becoming vested with the absolute estate, and disposing of his interest in it, he attempts to create an estate in his son that must deprive the widow and the other devisee of their interest by making them responsible for his own acts. Conceding that he had executed the power in express terms, having the privilege of holding the property as his own if he saw proper, it is too late, after consuming the estate, to make his co-executors and devisees responsible for his conduct by devising what he had already disposed of to his son.

No relations or class of kindred are mentioned as the appointees, but a discretion given the heir at law invested with the fee to dispose of the estate by will as he saw proper, and to whomsoever he pleased. With such a power confided to a mere stranger, upon his failure to exercise it the estate would have continued with the heir at law, where the title passed at the testator's death.

Here the father devises to his son one-half his estate for life, with the unlimited power to devise it to whomsoever he pleases. The son is to have the same right to bequeath his part of the estate by will as I now have. The son, and not the father, has the power to select one from the entire human race, and make that one the object of his bounty. It is not the devise of the father, but that of the son, and the appellants must claim under the will of Sidney Herbert in order to get any part of

the estate in controversy. He has a life estate, the fee in remainder, and the unrestricted power to devise. What greater estate could have been vested in him?

The life estate in fact was swallowed up by the fee in remainder, for if the life tenant becomes invested with the remainder, whether by purchase or by descent, he then has the whole estate. Two estates can not exist in one who has already the absolute fee.

It might be well argued that a devise to a stranger for life with such an unlimited power of disposition would pass the fee; but where the title is cast upon the heir by descent, who has already a life estate by devise, he is invested with a perfect title. A mere naked power to dispose of an estate by will vests no estate in the one authorized to execute the power. If Sidney Herbert had made no will his son would have taken the estate from him by descent. The latter was never the heir of his grandfather, but the heir of Sidney, and must take through him.

There was an action instituted in the Louisville Chancery Court in the year 1875 for a settlement of the accounts of these executors. The question involved in that case affected the whole estate of George W. Herbert—what estate came into their hands, and what was paid out. All who had any interest in that estate, whether in possession, remainder or reversion, or upon a contingency, were made parties. The present appellants, George W. Herbert, Jr., and his mother, were not made parties because they had no interest whatever in the controversy. The life tenants and the heir at law who, under our statute of descents, was invested with the title to the undevised estate were all before the court. No one else had an interest in the controversy. No one could have acquired an interest but by the voluntary act of Sidney Herbert as to his share unless under a coercive sale. He might have conveyed, as well as devised, his interest in the estate. If he had conveyed it the purchaser from him could not have been deprived of title by any subsequent will made by Sidney Herbert. The

power to devise given to one already vested with the fee gives no greater right than he already had. And the compliance or effort on the part of Sidney to execute this power may be binding on his executor, or those entitled to hold under him, but it can not affect the rights of these co-executors unless they have an estate in their hands belonging to Sidney Herbert. If his own estate can be made liable, it is a liability voluntarily assumed on his part, as he had the right to withhold the execution of the power and retain the fee in his own heirs, who would take by descent from him.

The judgment below is affirmed.

KEMPER v. COMMONWEALTH.

(Filed February 19, 1887.)

Punishment by city no bar to prosecution by State—Where, by the same act, one violates the police regulations of a city and also the criminal laws of the State, the punishment of the offender by the city for the violation of its ordinances does not bar a prosecution by the State for the violation of its criminal laws. And the fact that the city charter gives the city court exclusive jurisdiction of all offenses committed against the ordinances of the city does not give that court jurisdiction of an offense against the laws of the State, where the same act is a violation of both the city ordinance^s and the State laws.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Bennett.

The appellant was indicted, tried and convicted in the Daviess Circuit Court for keeping and maintaining a bawdyhouse in the city of Owensboro, Daviess county, Kentucky. Her fine was fixed by the jury at \$350.

She pleaded in bar that she had been tried for the same offense and convicted of it in the city court of Owensboro, which court, under the city charter and by-laws, had jurisdiction to try the offense.

The circuit court, regarding appellant's plea in bar as insufficient, overruled it and rendered judgment against her for \$350, the amount fixed by the jury. She has appealed to this court.

By the charter of the city of Owensboro its mayor and common council are authorized to pass such ordinances as they may deem necessary and proper for the purpose of suppressing disorderly houses, bawdyhouses, etc., within the city limits, and to prescribe the punishment for the violation of such ordinances.

Pursuant to this power the mayor and common council passed an ordinance providing that "if any person or persons who shall, within the city of Owensboro, establish or carry on, or permit to be carried on, upon his or her property, any house of ill-fame, shall, upon conviction for each and every offense, be fined not less than \$25 nor more than \$100; that each twenty-four hours same is carried on, or permitted to be carried on, shall constitute a separate offense under this ordinance."

The city charter also provides that "the city court shall have exclusive jurisdiction of all actions and prosecutions for violations of the ordinances and by-laws of the city."

The question is, was the appellant's trial and conviction in the city court of Owensboro, for having kept a bawdyhouse in the city in violation of the city ordinance, a bar to a prosecution by the State for the same acts, which constituted an offense against the laws of the State?

The ordinance and by-laws of the city of Owensboro, which provide for the good order, peace and morals of the city, are mere police regulations, and form no part of the criminal jurisprudence of the State.

The State exercises its judicial power in criminal cases arising under the general criminal jurisdiction of the State, and where its peace, good order and dignity is involved.

The power conferred upon the city of Owensboro by its charter, as well as the purpose of the ordinance passed pursuant to the charter, was to provide a mere police regulation for the enforcement of good morals, the suppression of bawdyhouses, within the city limits. The city did not attempt to punish the appellant for any offense committed against the laws of the State. It had no power to inflict such punishment. The offense for which she was punished was committed against the

good order and public morals of the city. The offense committed by appellant against the city and the State, although consisting of the same act, are quite distinguishable, and the prosecution for each offense proceeds upon different grounds: That of the city proceeds upon the sole ground of punishing for violating the city ordinance, the State having no jurisdiction to prosecute and punish for the violation of the ordinance. The prosecution by the State proceeds upon the sole ground of punishing for violating its criminal laws, which are applicable alike in the whole State, and violators of them must be punished by the same general principle, the city, by virtue of its police regulations, having no jurisdiction to prosecute and punish persons for violating the criminal laws of the State.

The case at bar aptly illustrates these principles. The punishment prescribed by the city ordinance for keeping a bawdyhouse within the city limits is a fine of not less than \$25 and not more than \$100. The punishment for violating the State laws by keeping a bawdyhouse is by fine or imprisonment, or both, at the discretion of the jury trying the case. So if the principle contended for by appellant prevailed, she, although violating the laws of the State as well as the police regulations of the city, could only be fined for keeping a bawdyhouse within the city limits from \$25 to \$100, whilst her neighbor, for keeping a bawdyhouse just beyond the city limits, could be fined and imprisoned at the discretion of the jury. Such a rule would be clearly wrong.

The truth is, that the appellant, by keeping a bawdyhouse within the limits of the city of Owensboro, violated its police regulations, for which the city had the right to punish her, and did punish her. And by the same act she violated the criminal laws of the State; and each had the right to punish her without reference to the jurisdiction of the other; and the punishment inflicted upon appellant by the city government for violating its police regulation was no bar to the right of the State to punish her for violating the criminal laws of the

State. (Cooley's Constitutional Limitations, 5th edition, page 241; The Mayor, &c. v. Allaine, 14 Ala., 402; Shafer and wife v. Mumma, 17 Maryland, 336.)

The provision in the city charter which gives the city court exclusive jurisdiction of all offenses committed against the ordinances and by-laws of the city speaks for itself. It means that the jurisdiction of the city court to try and punish all offenses against the police regulations of the city shall not be invaded by any other jurisdiction. (Levy v. The State, 6 Ind. 284.)

The judgment of the lower court is affirmed.

Owen & Ellis for appellant.

P. W. Hardin for appellee.

STRATTON v. McMAKIN.

(Filed December 22, 1879.)

Accord and satisfaction—Acceptance of forged note—Where a creditor holding a note, in which there are two obligors, accepts as a renewal thereof a note purporting to be signed by both obligors, but which is in fact a forgery as to one of them, he, having accepted the renewal note in ignorance of the fact that it was a forgery as to one of the obligors, may sue and recover upon the original note, there being no consideration for its surrender.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Cofer.

The appellant alleged in substance that on the 1st of January, 1873, the appellee, McMakin, and one S. D. Hinkle, executed to him a note, wherein they promised to pay him the sum of \$1,600; that in January, 1878, Hinkle delivered to him two notes for \$1,300, each purporting to be signed by himself and McMakin; that said notes were delivered as renewals of the note for \$1,600, and the accrued interest thereon, and for other indebtedness of Hinkle to him; that Hinkle represented that the signatures of McMakin to said note were genuine, and, confiding in his statements, he accepted the notes,

and surrendered the old note to Hinkle; that he sued McMakin on the notes, and on his plea of non est factum there was a verdict and judgment in his favor. He alleged that Hinkle had been adjudged a bankrupt, and hence was not sued. He prayed for judgment on the note for \$1,600; McMakin demurred to the petition; his demurrer was sustained and the action dismissed. The verdict and judgment in the suit on the notes accepted in renewal conclusively establish the invalidity of those notes as to McMakin, and the allegations of the petition show that appellant accepted them in ignorance of the fact. He has then, without fault on his part, and without any consideration whatever for so doing, surrendered the note on which McMakin was confessedly bound, and if the judgment of the court below be permitted to stand McMakin has been released and the appellant has lost his debt without fault on his part simply because he confided in the false statements of Hinkle, and that, too, without his having done any act, as far as appears, by which McMakin has been in anywise injured. If such be the law, all must admit that in this case at least the law is extremely harsh.

That the law is otherwise is well established by authority, though never expressly decided by this court. It has been held in many cases that if a new security be given for a subsisting debt, and that security be void for any reason, it does not satisfy or discharge the pre-existing debt or liability. (Robinson v. Bland, 2 Burrows, 1077; Gray v. Fowler, 1 H. Blackstone, 462; Johnson v. Johnson, 11 Mass., 359; Ramsdell v. Soule, 12 Pick., 126, opinion by Shaw, C. J.; Markle v. Hatfield, 2 Johnson, 459, opinion by Kent, C. J.) Many other cases to the same effect might be cited, but these, in the absence of any modern case holding a contrary doctrine, are sufficient.

But these cases are not exactly analogous to the case at bar. In those cases the new security was absolutely and wholly void. In this case the new notes were valid as to Hinkle, and the question arises whether that will take the case out of the rule just stated. We think it will not, and without entering upon

an extended discussion we may rest this question also upon abundant authority. *Ritter v. Singmaster*, 73 Penn. St., 400, is exactly in point. In that case James Singmaster and others, who were private bankers, purchased of Burkhalter a promissory note, of which Burkhalter was maker and Ritter and Peck were endorsers. This note bore date April 8, 1870. July 8 that note was taken up and another for the same amount made by Burkhalter, and purporting to be endorsed by the same persons as the first, was given in renewal, and this was repeated once or twice at subsequent dates. It turned out that while the endorsements of Ritter and Peck on the first note were genuine, their names on the renewals were forged. Singmaster sued on the first note, and it was held that the renewals did not discharge the endorsers from their liability on the first note. In *Bank v. Letcher*, 3 J. J. Mar., 195, this court held the same thing in effect. In that case it appears that the bank sued Wm. Wilson and Joseph P. and Benjamin Letcher on a note for \$400, dated April 12, 1822. Wilson was not served with process, and the action abated as to him. The note had been renewed, and the Letchers pleaded the renewal as an accord and satisfaction. The bank demurred. The court gave judgment on the demurrer in favor of the defendants. The bank appealed. This court held the plea bad upon two grounds: First, that "one obligation given in satisfaction for another is no discharge, whether grounded on an accord or not;" second, that the plea was defective in not averring that the note relied on in the plea was duly executed by Wilson and the Letchers, and was obligatory upon them; that it did not appear from the plea that the note relied on possessed any obligation whatever. It may have been a forgery. It did appear from the plea that Wilson tendered the note mentioned to the bank, and consequently that he was bound upon it, but he did not plead, and the court was evidently only referring to the Letchers when it said it did not appear from the plea that the note was obligatory. The case clearly shows that if it had appeared that the names of the Letchers on the renewal note

were forged the court would have held there was no satisfaction of the original note independently of the first point of objection to the plea.

That case was again in this court, and will be found reported in 1 Dana, 82, where it appears that the note was in fact three times renewed. The first renewal, that pleaded as an accord and satisfaction, being signed by the Letchers, and the second being as to them a forgery, and the bank was defeated because the court held that the discounting of the second note, owing to the bank's manner of doing business, was a payment of the first note.

Tested by the authorities cited the petition is sufficient to entitle the appellant to maintain his action, and the judgment is reversed and the cause is remanded, with directions to overrule the demurrer.

John S. Kelley for appellant.

E. E. McKay for appellee.

KENTUCKY SUPERIOR COURT.

WARD, &c. v. ADAMS' TRUSTEE.

(Filed February 23, 1887.)

Landlord and tenant—Destruction of rented premises—The tenant is bound to pay the rent for the term, though the rented premises be destroyed by inevitable casualty; and he is not helped by the fact that the landlord may, during the term have had the property insured for his own benefit.

Appeal from Garrard Circuit Court.

Opinion of the court by Presiding Judge Bowden.

The weight of authorities seems to establish it as a rule, both of law and equity, that the tenant is bound to pay the rent, though the premises demised be destroyed by inevitable casualty. (Redding v. Hall, 1 Bibb., 536; Harrison v. Murrell, 5 Mon., 359; Proctor v. Keith, 12 B. Mon., 252; Helburn v. Mofford, 7 Bush, 169.) Brown lays down and considers

this rule under the maxim *actus dei nemini facit injuriam*, the propriety of which will appear if we call to mind the relation of the parties.

The fullest right of property is the exclusive right to the perpetual use. Others may be admitted to a joint participation in that right, and then, with respect to them, it is no longer exclusive. Others may be admitted to a participation in the exclusive use, acquiring that exclusive use for a limited period. The right to the use constitutes the interest, and is in our system called an estate when of a given importance. Where one acquires such an interest for one year or a number of years it is called a term. That is his property. The rent he agrees to pay is the price of the term. He buys it. If anything occurs to render it less valuable the loss falls on him, for the same reason that any one else has to bear a loss resulting from an accident to things owned by him—because the thing injured belongs him. *Res perit suo domino*. Who else should suffer the loss? Because the tenant loses the use of a house, which use he has purchased for a term, shall the landlord be made to bear it? If a personal article is sold, and it is destroyed by fire the hour the vendee gets it, shall the vendor lose the price?

The rule does not arise, as counsel seems to think, out of a desire to equalize the loss. That would be an involuntary contribution which only an arbitrary power could assess. The purpose is to make him who owns the thing lost bear the loss. In *Redding v. Hall*, he who hired a slave, being thus the owner of the use for the term, was required to pay the medical bill incurred in curing the slave while sick. That is a stronger case than *Harrison v. Murrell*, where the hirer was compelled to pay the price of the hire though the slave died almost at the beginning of the term; for in the former there is a suggestion, at least, that the services of the physician may have prevented loss to the owner by saving the slave's life.

Broom, citing many cases, says that in the absence of a special contract the landlord is never liable to rebuild even if

he has received the value from an insurance office, though the tenant is liable for the rent until the tenancy is terminated. A term is an insurable interest, and the tenant may, by insurance, protect it if he desires. If he fails to do so, we see no reason why he should be permitted to throw his loss, which he would not provide against, on the landlord, who did provide against a loss that might affect his reversionary interest. That would be only a mode of violating the rule which we have been considering, and convert a policy of insurance taken out by the landlord for his own protection into a policy for the protection of the tenant primarily and to the full extent of his loss, though the whole amount might be insufficient to indemnify the landlord.

We are, therefore, of the opinion that the accidental destruction of the house by fire was not a defense to the action on the note given by the appellants for rent, and that they were in no way helped by the fact that the appellee, during the term, had the house insured for his own benefit.

It was fortunate for the appellants that they rented for one year only, and that they had merely an option for a longer period. This fact, whereby they escaped liability for rent during that longer period, can not be made the basis for a claim to compensation for inconvenience in not being able to get the use of a house, for which they would have been compelled to pay if they had rented it for that time.

The judgment is affirmed.

W. O. Bradley for appellant.

R. H. Tomlinson for appellee.

COURT OF APPEALS ABSTRACTS.

PHILLIPS v. QUEEN.

Filed February 19, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Holt, reversing.

Homestead—Where the husband asserts the right to a homestead, either by suit or motion, before a court having jurisdiction, and it is determined against him, the question can not be relitigated by reason of the wife joining with him in a second proceeding.

In this case the husband moved the court, which had awarded a writ of possession, to quash it upon the ground that he was entitled to a homestead in the land for which the writ issued. The court, after hearing, overruled the motion. The husband then, together with his wife, brought this action, enjoining the execution of the writ, and asking that they be allowed a homestead.

Held—That the judgment overruling his motion to quash the writ is a bar.

John D. Wickliffe for appellant.

FREY v. CAMPBELL.

Filed February 24, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Holt, affirming.

1. A mortgagee in possession is bound to account for the rents and profits received by him, or if he has received none, or has failed to keep proper accounts, he must account for a reasonable rent, which it will be presumed he might have received by the exercise of reasonable care and diligence. And he can not be allowed for improvements which may better the estate, or which are of a permanent character even, unless they were proper to keep the property in necessary repair.

In this case the mortgagee having rented the property, but failed to render any account, is chargeable with a reasonable rent, which must be determined by the evidence of experts as to what ought to have been received for the rent.

2. C. conveyed to F., by a deed absolute on its face, her life estate in a tract of land, while F. at the same time executed to her a writing binding himself to reconvey to her so soon as he might realize from the rents thereof a sum sufficient to repay him what he had paid out for her in redeeming the land from an execution purchaser. **Held**—That the two writings together constitute a mortgage.

Owen & Ellis for appellant; George W. Jolly for appellee.

OWENSBORO & NASHVILLE R. R. CO. v. DAVIESS COUNTY.

Filed February 24, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Railroad commission—The act prescribing the mode of taxing railroads and providing for the appointment of railroad commissioners is constitutional.

2. Taxation of railroads—Appellant having purchased the property and franchises of another company, its property acquired since the purchase is subject to taxation for the payment of its part of the county's subscription to aid in the construction of the old road. (Clark Co. Ct. v. E., L. & B. S. R. R. Co., 7 Ky. Law Rep., 761.)

R. S. Bevier for appellant; Yewell & Hoskins for appellee.

TAYLOR v. LOLLER'S EX'ORS.

Filed February 26, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Chief Justice Pryor, reversing.

1. Appellate jurisdiction—This court has jurisdiction of an appeal where the contest is between the creditor of a decedent and the widow as to the creditor's right to subject the homestead of the decedent, although the creditor's claim be less than \$100.

2. Widow's right to homestead—Where it does not appear that the widow of a testator has renounced the provisions of her husband's will devising to her all his estate, she must be presumed to hold under the will, and can not claim a homestead as against her husband's creditors.

3. Homestead of decedent—Where a debtor dies and his right to the homestead or its occupancy passes to his widow, or to her and his children, it may be subjected to sale by his creditors subject to this occupancy, therefore, if it appears upon the return of this case that the widow has renounced the will, the homestead may be subjected subject to her right of occupancy.

A. C. Rucker and Richards & Hines for appellant; Wm. E. McAfee for appellee.

LANDERS v. BARBEE.

Filed February 26, 1887. Appeal from Edmonson Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Adverse possession—In an action by appellee against appellant to recover for a breach of warranty of title it was not strictly accurate to instruct the jury that the defendant could not avail himself of any possession of the plaintiff and those under whom he claims unless such possession was continuous for fifteen years before the institution of the suit in which the judgment was rendered under which plaintiff was evicted, since an actual, continuous, adverse possession for a period of fifteen years, whether immediately before the institution of suit or not, will ripen into a perfect title; but the instruction was not prejudicial, as it does not appear that there had been at any time a possession of fifteen years.

2. An adverse possession without title should never prevail against the true owner unless the evidence of such possession continuously for the period fixed by statute is satisfactory.

3. What amounts to possession—The court properly instructed the jury that "no possession was acquired by making a marked boundary around the land unless the party claiming the land or some one for him resided on the land within such boundary, and claimed the land to such boundary adversely."

W. E. Settle for appellant; Edwards & Hazelip for appellee.

BONNEY v. BONNEY.

Filed February 26, 1887. Appeal from Madison Circuit Court. Opinion of the court by Judge Bennett, reversing.

Custody of children—While, as a general rule, the father is entitled to the custody of his infant children, yet where the father and mother have separated, and their infant children must of necessity be deprived of the care, protection and training of one of them, then it is the duty of the court to confide the custody of the infants to that parent, whether father or mother, best suited to maintain, protect and educate them and bring them up in moral courses; and the court, in making the selection, must have in view the financial, moral and intellectual capacity of each parent to properly care for and raise the children; and if both are capable, then the court may base its selection upon other circumstances pointing to the best interest of the infants.

In this case the wife, through improper interference on the part of others, separated from the husband without justifiable cause, and it appears probable that with the improper interference withdrawn she will return to her husband. Their infant daughter is with the father's mother, by whom she is well cared for, the father, who is a sober, industrious man, providing for her support, and being very fond of her. The mother of the child who, by a writ of habeas corpus, is seeking to obtain the possession of the child, is a good woman, and would train the child properly, but has but little means of her own, and to support herself and child would have to rely on her labor and such assistance as she might obtain from her father, who, it is probable, will move from the State. Held—That the father should be allowed to retain the custody of the child, with the right to the mother to visit the child as often as she may desire and remain as long as she may wish, the court reserving the right to give to the mother the custody of the child if sufficient cause be shown.

John Bennett, C. F. & A. R. Burnam and James Benton for appellant.

FIRE ASSOCIATION OF PHILADELPHIA v. DICKEY, &c.

Filed March 3, 1887. Appeal from Barren Circuit Court. Opinion of the court by Chief Justice Pryor, reversing.

Fire insurance—Misrepresentation as to ownership—L. and F. were brothers. L., an infant, was doing business as a merchant in his own name. F., an adult, held L.'s note for money claimed to have been loaned L. to enable him to carry on his business. L. obtained insurance from appellant on his stock of goods, having the policy endorsed for the benefit of F. to secure him in his indebtedness. The goods having been burned the

amount due on the policy was garnished by appellees, whose debts were for goods sold to L., they claiming that F. was a partner, or the sole owner, and liable for their debts. L. pleaded infancy and F. denied his liability. Appellant answered as garnishee that there had been no proof of loss, and that it might or might not be indebted to the parties. The court held that F. was part owner of the goods, and rendered judgment against him in favor of plaintiffs; directed the court's commissioner to make proof of loss, under the policy, to collect the attached fund and report as to priority of liens. Appellant refusing to pay the value of the goods, L. and F. brought this action for the benefit of the attaching creditors to recover the insurance. Appellant pleaded that L. was not the owner of the goods at the time of insurance, and that it was, therefore, not liable. Held—That the creditors are precluded from denying that F. was a partner, and, therefore, the insurance must be held void on account of the misrepresentation of L. that he was sole owner. The judgment against appellant as garnishee was not final, the object in requiring proof of loss being to enable the court to determine whether a liability existed.

Temple Bodley and C. S. Grubbs for appellant; W. L. Porter and W. P. D. Bush for appellees.

MORRISON, &c., SURVIVING PARTNERS, &c. v. DAY.

Filed March 3, 1887. Appeal from Fleming Circuit Court. Opinion of the court by Judge Bennett, reversing.

Sales of personal property—Delivery—Appellants allege in their petition against appellee that, at different dates named, they sold to appellee two lots of pork at an agreed price per pound, each to be delivered at appellee's option in the month in which it was sold, and to be paid for on delivery; that they delivered one lot on the 6th of March, immediately after its sale, and the other on the 30th of March, about sixty days after its sale; that appellants agreed to hold the pork for appellee at an agreed sum per month, and in case appellee failed to pay this sum at any time appellants were to sell the pork and apply the proceeds to their debt; that appellants held the pork at appellee's request from the 31st of March until the 27th of September, when appellants, appellee having failed to pay the agreed margins, sold the pork and credited the proceeds upon appellee's debt, leaving a balance due them, for which they ask judgment. Appellee denied the delivery, and claimed damages for the failure to deliver. Appellants testified that they held the pork for appellee at his request, for which he was to pay them at the alleged rate, and that about the 1st of September appellee agreed that they should sell the pork at about a named price, using their judgment, and that they did so sell. The court instructed the jury peremptorily to find against appellants on their claim, and under instructions the jury found for appellee the damages claimed. Held—That the testimony of appellants was competent to show there was in fact a delivery of the pork, a delivery to a third person at appellee's request being a delivery to him; and that the delivery was not at the time alleged immaterial, time not being of the

essence of the contract. And whether the contracts were executed or executory, if appellants held the pork for the benefit of appellee, and sold it at his request, the proceeds to be applied to appellee's indebtedness, appellants were entitled to recover the difference between the proceeds of sale and the contract price of the pork. The peremptory instruction was, therefore, improper.

W. J. Hendrick and Wm. Lindsay for appellants; A. Duvall for appellee.

FLANNERY, &c. v. UTLEY, &c.

Filed March 3, 1887. Appeal from Livingston Circuit Court. Opinion of the court by Judge Holt, affirming; Chief Justice Pryor dissenting, and Judge Bennett not sitting.

1. A surety's right of subrogation is confined to the rights and securities of the contract for which he was surety.

2. Sureties—Vendor's lien—If a surety for the price of land is made responsible the chancellor will give him the benefit of the lien of the vendor; but this doctrine can not be extended so as to embrace this case.

A wife, in order to pay off a vendor's lien upon land which she had purchased, applied to her husband for money which she had loaned to him, but which had vested in him absolutely by virtue of the marital relation. The husband borrowed the amount asked for, executing his note therefor with personal security, and paid it to the wife, and with it she discharged the lien. The husband's sureties having paid the note upon which they were bound, seek to be substituted to the vendor's lien upon the wife's land. Held—That the land can not be subjected to the claim of the sureties.

Bennett & Blue for appellants; J. C. Hodge and W. D. Greer for appellees.

COMMONWEALTH v. WHITNEY.

Filed March 10, 1857. Appeal from Barren Circuit Court. Opinion of the court by Chief Justice Pryor.

Indictment—Obtaining goods under false pretenses—An indictment against appellee for obtaining property under false pretenses alleges that the defendant fraudulently represented to R. that he was then at work for C. and had been for two years; that C. had told him to come to R.'s storehouse and get the goods specifically described in the indictment and that he, C., would call and pay for them, and that the said R., relying on the representations of the accused, let him have the goods; that all said statements and representations were false, and known by the accused to be false when made, and were made by him with the intent to commit a fraud, and that by reason of them the goods were delivered. Held—That the indictment is good.

P. W. Hardin for appellant.

GARVEY, EX'OR, &c. v. GARVEY, &c.

Filed March 12, 1887. Appeal from Owen Circuit Court. Opinion of the court by Judge Lewis, affirming.

Fraudulent conveyances—A conveyance of land by a father to his two sons is attacked as fraudulent by a creditor of the father. The grantees make it clear by a detailed statement that they had sufficient means to purchase the land, and both they and the grantor testify that the sale was in good faith and for a valuable consideration. The only evidence to the contrary is the vague opinion of witnesses that the grantees had not made enough money to pay for the land. It also appears that the plaintiff, the only creditor of the grantor, had stated to the grantees before the purchase was made that he did not look to this land for the payment of his debt. Held—That there is no evidence of fraud.

W. Montfort for appellants; J. J. Landram and J. W. Green for appellees.

DUNN, &c. v. GERMAN SECURITY BANK.

Filed March 12, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Holt, affirming.

1. The title of a purchaser at a judicial sale, although he be the plaintiff in the action, is not affected by the reversal of the judgment, and the report of sale having been confirmed, it is immaterial that no deed has been made, as the confirmation of the sale vests in the purchaser the right to a deed.

2. The chancellor of the Louisville Chancery Court had the power to confirm a sale made under a judgment rendered by the vice chancellor.

3. **Void judgments**—The fact that a petition seeking the enforcement of an alleged lien for a street improvement assessment fails to show that the proper steps have been taken to create the lien does not render void a judgment of the court declaring the existence of a lien and ordering its enforcement.

Robert J. Elliott for appellants; Lane & Burnett and Gibson & Gibson for appellee.

GRISWOLD, &c. v. GOLDING, &c.

Filed March 17, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Holt, affirming.

1. **Conflict of laws**—*Lex loci contractus*—A contract if void or illegal by the law of the place of contract, and void everywhere, unless a different place be appointed for performance, where, by the local law, it is legal and enforceable.

In 1876 husband and wife executed a note in Missouri, where they resided, no place of payment being named in the note. The note was executed for necessities. The wife had no estate in Missouri, but had land in Kentucky, which was her general estate. By the law of Missouri the contract of a married woman imposes no personal obligation, and can not be enforced as against her general estate. By the law of Kentucky in force when the note was executed the general estate of the wife was liable for a debt created by her for necessities if evidenced by a note signed by both her and her husband. This is an action to subject the wife's general estate in Kentucky to

the payment of the note. Held—That her general estate is not liable. It can not be presumed that the wife signed the note with a view to its payment in this State or to its being a charge upon her land here.

Charles Eginton, W. M. Beckner and R. C. Gray for appellants; W. H. Mackoy for appellees.

KING v. COMMONWEALTH.

Filed March 17, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Bennett, affirming.

1. Continuance—The court did not err in refusing a continuance, as the attorney for the Commonwealth consented that the affidavit as to what the absent witness would swear, or so much of it as was competent, might be read as evidence on the trial.

2. Instructions—The court can not review the instructions, as they were not excepted to.

J. R. Sampson for appellant; R. D. Hill and P. W. Hardin for appellee.

SUPERIOR COURT ABSTRACTS.

MAYNARD v. HATFIELD.

Filed February 9, 1887. Appeal from Pike Circuit Court. Opinion of the court by Judge Barbour, affirming.

Negligence—Damages—M. closed a dam by the consent of S., the owner of the dam, and kept it closed for so long a time that the great amount of water accumulated at the dam swept it away and flooded the property of H., who, by this action, seeks to recover of M. the damage he sustained thereby. M. was told by H. not to close the dam, as he feared a fall of rain, whereupon M. promised to watch the dam and see that H. sustained no injury. Held—That as it does not appear that there was an unusual rise at the time the dam was washed away, the conclusion necessarily follows that the closing of the dam, and keeping it closed the length of time it was closed, caused the damage the plaintiff sustained, and he is entitled to recover.

P. A. Cline, John L. Scott and Connolly & Parsons for appellant.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. HOUSEMAN.

Filed February 9, 1887. Appeal from Graves Circuit Court. Opinion of the court by Judge Barbour, dismissing.

1. Terms of Superior Court—This court has, by its orders, adopted the rules of the Court of Appeals, which, for the purpose of conforming to the

law or rules requiring anything to be done before the commencement of a term, has fixed the first Mondays in January and September as the commencement of the terms of the court.

2. Failure to file transcript—Where the appellant fails to file his transcript within twenty days before the second term after the granting of the appeal, and does not within that time have an order made extending the time, the court will, upon the motion of appellee, dismiss the appeal, although the appellant may, by accident or misfortune, or the misconduct of the clerk, have been prevented from obtaining the transcript in time.

Holmes Cummins for appellant; Rodes, Settle & Rodes for appellee.

GAINES v. GRANT.

Filed February 9, 1887. Appeal from Boone Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Slander—In an action for slander, in order to justify or excuse the speaking, the answer must admit the words as charged.

2. When there is a special verdict which is decisive of the controversy, there can be no reversal except for an error which affects that verdict.

3. Verdict severable—Where the jury, by a general verdict, find "for the plaintiff, and assess his damages" at a certain amount, the verdict is severable, and there being a special verdict entitling the plaintiff to judgment, it is necessary to consider only so much of the general verdict as assesses damages.

4. Evidence—In an action for slander, evidence as to the plaintiff's reputation, introduced for the purpose of mitigating the damages, should be confined to the reputation which he bore prior to the speaking of the words complained of, while such evidence, when introduced for the purpose of affecting the plaintiff's testimony, may have reference to his reputation up to the time of trial.

In this case, in which the words spoken charged the plaintiff with false swearing, the court properly refused to instruct the jury that in assessing damages they might consider the evidence before them as to the character of the plaintiff, that evidence being directed to the character of the plaintiff at the time of the trial.

5. Evidence as to the plaintiff's character may be given under the issue made by a traverse. It was, therefore, not error to refuse an amended answer attempting to make an issue as to the character of the plaintiff.

O'Hara & Bryan and A. G. Winston for appellant; Warren Monfort and Riddell & Tolin for appellee.

HARRISON v. KIRK'S ADM'R.

Filed February 9, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Ward, reversing.

Sureties—Contribution—All of the sureties of a failing debtor, together with the debtor himself, entered into a contract whereby it was agreed that \$5,000, the proceeds of a tract of land sold by the debtor, should be paid on the debts for which the different sureties were bound, "in the order men-

tioned," and that "to the extent said \$5,000 fails to pay the same, the undersigned agree to contribute equally in making up the balance necessary to pay off said debts in full." Some of the sureties were insolvent, but it was not known. Held—That each of the sureties, four in number, is liable for only one-fourth of the deficit, without regard to the solvency or insolvency of the others, the agreement having been entered into with the understanding that all were solvent.

Wm. Lindsay and G. W. Jolly for appellant; Owen & Ellis for appellee.

CISSELL v. O'NEAL.

Filed February 9, 1887. Appeal from Marion Circuit Court. Opinion of the court by Judge Ward, affirming.

Verdicts—Affidavits of jurors to explain—After a verdict has been returned and the jury discharged, affidavits of the jurors that the instructions or special interrogatories were misleading, and that they thought the effect of their verdict would be different from the effect given it by the court, will not be considered, either for the purpose of correcting the verdict or for the purpose of granting a new trial.

Hill & Rives for appellant; Thomas & McChord for appellee.

WATSON v. HOLMES, &c.

Filed February 9, 1887. Appeal from Robertson Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Injunction—Damages—An injunction having been dissolved upon the ground that an injunction would not lie to prevent a mere trespass, the defendant can not recover damages. One can not be hurt by being prevented from doing a wrong.

2. Statute of frauds—A contract made in October, 1880, for the renting of a tract of land, the term to begin March 1, 1881, and to end March 1, 1882, was not a contract to be performed within a year, and, not being in writing, can not be enforced.

W. W. Kimbrough for appellant; Thomas Owens for appellees.

FRANK, &c. v. QUAST & SHULTEN.

Filed February 9, 1887. Appeal from Breckinridge Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Negotiable Instruments—Accommodation drawers—If an acceptor holding a bill drawn for his accommodation passes it to a bona fide purchaser before maturity, the purchaser takes it free of all defenses of which he has no notice.

A bill of exchange was drawn for the accommodation of the drawers, to whom it was endorsed in blank and delivered by the drawers, under an agreement between the drawers and the drawees, who became the acceptors, that the latter were to negotiate the bill in the bank at which it was made payable. This was attempted by them, but the bank refused. They then delivered it, before maturity, to a creditor of theirs, who took it at its face value, and credited his account against them. A few days after the bill was

drawn the bank was notified not to discount it, but the purchaser of the bill had no notice of this fact, or of the agreement that the bill was to be discounted at the bank. Held—That the secret agreement between the drawers and acceptors is not an available defense in an action by the holder of the bill against the drawers.

Lewis & Fairleigh for appellants; J. G. Haswell and W. A. Mason for appellees.

CENTRAL PASSENGER RY. CO. v. BISHOP.

Filed February 9, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Presiding Judge Bowden, affirming.

1. Negligence—Street railways—A carrier of passengers "must use the utmost care and skill which prudent men are accustomed to use under like circumstances," and this rule applies as well to a company whose cars are drawn by horses as to one whose cars are drawn by steam engines.

2. Carriers—Burden of proof—Where a passenger whom a carrier has undertaken to transport is injured by an accident, which occurred under circumstances under which such accidents do not generally occur if proper care is used, the burden is on the carrier to explain how it chanced to occur.

In this case there was a collision between the defendant's street car and a railroad train belonging to another company, whereby the plaintiff, a passenger on the street car, was injured. Held—That the burden of proof was on the defendant to show that the collision was not caused by negligence on the part of the driver in charge of the street car, and the jury was properly so instructed.

Brown, Humphrey & Davie for appellant; Helm Bruce for appellee.

STIRMAN v. SMITH.

Filed February 16, 1887. Appeal from Daviess Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Appellate jurisdiction—In an action in which the law and facts were submitted to the court the court announced its conclusion that the property, the value of which was sued for, was worth \$80, but upon defendant's admission that it was of the value of \$100, the amount claimed by plaintiff in his petition and evidence, the court changed the value, and rendered judgment for \$100, the plaintiff objecting and excepting. Held—That the amount of the judgment determines the jurisdiction of this court, and not the value first fixed by the court.

2. Exemptions—An execution defendant having a cow and calf and also two heifers, the cow and calf were primarily exempt under the provisions of the General Statutes exempting "two cows and calves," and while the debtor had the right to elect to keep the two heifers and give up the cow and calf, in the absence of such an election the cow and calf were exempt, and the officer is liable as a trespasser for seizing and selling them.

3. Sale by officer of exempted property—Under the act of May 3, 1880, providing that when the defendant in an execution selects a cow and calf ex-

ceeding in value \$60, the officer making the levy shall cause the property to be appraised; and that if appraised at more than \$60 it shall be sold and the debtor allowed out of the proceeds that sum; it is the duty of the officer to have the appraisement made if the property is exempt, whether or not the debtor claims it as exempt, and if he fails to do this and sells he is liable, whatever the value of the property may be.

4. Housekeeper—The fact that a debtor had sent his family to another State with the intention of following them and making his home in that State as soon as he could dispose of his property did not deprive him of the character of a housekeeper, or of the benefit of the exemption laws of this State.

Owen & Ellis for appellant; R. W. Slack and Richards & Hines for appellee.

SINGLETON, &c. v. McQUERRY.

Filed February 16, 1887. Appeal from Garrard Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Descent and distribution—The title to the property of an intestate, which the statute directs to be set apart as exempt from distribution, vests absolutely in the widow, and she alone can sue for its recovery, or conversion, after it is so set apart to her, and the children are neither necessary nor proper parties to the action.

2. Same—Where all the property of the intestate is exempt from distribution, the appointment of an administrator and appraisers and the setting apart of the property by the latter are not necessary to enable the widow to maintain an action for the conversion of the property.

3. Limitation—Where one against whom a cause of action has accrued obstructs the bringing of suit by departing from the State, the time of his absence from the State is not to be computed as any part of the period of limitation.

J. H. Brown and Anderson & Herndon for appellants; H. C. Kauffman for appellee.

MALCOLMB v. SUTER.

SUTER v. MALCOMB.

Filed February 16, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Judicial sales—Notice—The court refuses, upon the appeal of the plaintiff, to reverse an order setting aside a sale made under a judgment which did not prescribe how long notice should be given of the sale, it not appearing that even a reasonable notice was given. The fact that the defendant purchased a part of the property did not preclude him from asking that the sale be set aside.

2. Estoppel—The defendant having made persistent effort to maintain a sale is precluded from attacking the judgment under which the sale was made.

J. Andrew Scott and Richards & Hines for Malcomb; D. W. Lindsey for Suter.

HOWE & TRIMBLE v. LANE, &c.

Filed February 16, 1887. Appeal from Montgomery Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Husband and wife—Arrangement between the husband and another, whereby they raise a crop on the wife's land, is only a mode by which the husband uses the land, and not a renting of it, and the husband's part of the crop may, therefore, be subjected by his creditors.

2. Execution levy—Death of defendant—The death of the defendant in an execution which has been levied upon personal property does not discharge the levy, but until it is revived suspends all power in the sheriff except to maintain the status existing under the levy when the defendant died.

In this case a claimant's bond, taken by the sheriff after the death of the defendant, is held not to be a statutory obligation which can be enforced by motion. But the special proceeding will not be a bar to an action at law on the bond if the facts are such as will sustain that action.

Cornelison & Mitchell for appellants; H. L. Stone for appellees.

COMMONWEALTH v. JARRELL.

Filed February 16, 1887. Appeal from Elliott Circuit Court. Opinion of the court by Judge Ward, affirming.

Sales of liquor by distillers in quantities of not less than a quart, whether at the distillery or at the distiller's residence, are sales "in the usual course of trade" within the meaning of the local option law, which excepts from its provisions sales made by manufacturers "in the usual course of trade."

P. W. Hardin and J. B. Hannah for appellant.

LOUISVILLE & NASHVILLE R. R. CO. v. THORPE.

Filed February 16, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, reversing.

Railroads—Contracts to carry passengers—Appellee sued appellant to recover damages for injuries received while traveling as a passenger on a railroad train between certain points in the State of Florida, alleging that appellant, running and operating the road, contracted with him to safely carry him "upon its said road" between the points named. The plaintiff testified that he purchased a ticket at defendant's office in Cincinnati, from its agent, to carry him from Cincinnati to Jacksonville; that his "impression" was that "they" were the tickets only of the defendant. The proof shows that another company than the defendant controls and operates that part of the road upon which plaintiff was injured.

Held—That neither the petition nor the proof shows a contract by the defendant to transport the plaintiff over any road but its own.

Lyttleton Cooke and Wm. Lindsay for appellant; Hallam & Myers for appellee.

FLETCHER v. BLANTON, &c.

Filed February 16, 1887. Appeal from Louisville Law and Equity Court. Opinion of the court by Judge Barbour, reversing.

1. Sales of estate owned jointly—The chancellor has the power under subsection 2 of section 490 of the Code to order a sale of real property owned jointly by two or more persons, although one of the joint owners in an infant and has only an interest in remainder. A joint right of possession is not necessary to give jurisdiction to order the sale.

2. Receivers—The fact that property is in the hands of a receiver will not prevent the chancellor from ordering its sale in an action brought under subsection 2 of section 490 of the Code, the court which appointed the receiver having, by an order entered in the action in which the appointment was made, given leave to the plaintiff to bring the suit, the same persons being parties to both actions.

S. B. Toney for appellant; C. B. Seymour for appellees.

WARD v. BEST'S EX'OR.**BEST'S EX'OR v. WARD.**

Filed February 16, 1887. Appeals from Garrard Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

Partnership—A partner can not maintain an action against his co-partner to recover, by way of contribution, a part of what he has paid for the firm on particular debts. The firm business must first be settled, and the personal liabilities of the partners ascertained. This action, therefore, by one partner against the other, without such a settlement, was improper, but as it was accepted as proper, and the subsequent proceedings have some resemblance to an effort to adjust the affairs of the partnership, this court will treat it as an action prosecuted for that purpose.

R. H. Tomlinson for Ward; W. O. Bradley for Best's executor.

COMMONWEALTH v. WEIRAND.

Filed February 16, 1887. Appeal from Mason Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

An indictment for suffering gaming, which charges that the defendant suffered games on which "money or other property was bet, won and lost" is not sufficiently certain, and, therefore, not good.

P. W. Hardin for appellant; Thomas R. Phister for appellee.

GOCKAL, &c. v. WEIGHAUS, &c.

Filed February 16, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Failure of garnishee to answer—It is only where the attaching creditor has obtained judgment and return of "no property" that he can make a garnishee a defendant and take judgment against him by default in the event he fails to answer. In other cases, if the garnishee fails to make a

disclosure, he must be proceeded against, if at all, as provided by section 226 or section 227 of the Code.

2. Notice to garnishee—The fact that the debt sought to be attached is described in the petition, and that the garnishee is served with summons, does not dispense with the necessity of serving on him a notice describing the debt in order to create a lien.

3. Lien perfected by answer—Where the garnishee answers and makes a disclosure, the lien of the plaintiff is thereby made perfect, although a sufficient notice had not been served on the garnishee, but the lien thus acquired does not relate back and overreach liens acquired prior to the filing of the garnishee's answer.

4. No mechanic's lien exists unless the claimant perfects his lien as required by section 6 of chapter 70, General Statutes. The words "the lien shall be dissolved" mean there shall be no lien.

Collins & Fenley for appellant; Wm. Goebel for appellees.

NEW ORLEANS INSURANCE CO. v. O'BRIAN, &c.

Filed February 23, 1887. Appeal from McCracken Court of Common Pleas.

Opinion of the court by Judge Ward, affirming.

1. Insurance—Revocation of agent's authority—An insurance company, after informing an agent that it had determined to withdraw from the State, directed him to "cease to make new business," and to forward to it "the remaining unwritten policies" in his hands. Held—That the agent's authority to act with regard to the old business of the company was not withdrawn, and that he still had the power to bind the company by an agreement that a policy should not be avoided by leaving the insured property vacant for thirty days.

2. A verbal agreement to alter or modify a written contract is binding on the parties, although the original contract may have stipulated that no alteration or modification of the contract should be valid unless evidenced by writing.

In this case the verbal consent of an insurance agent that the insured property might remain vacant for thirty days without avoiding the policy is held to be binding on the company, although the policy provided that if the building should become vacant the policy should become void "unless consent in writing by the company be endorsed hereon."

3. Value of insured property—Estoppel—In an action upon a policy of fire insurance the plaintiff is not concluded as to the value of the insured property by his statements in his proofs of loss. Those statements are simply admissible in evidence as affecting the value of the evidence on the plaintiff's behalf on the trial.

4. New trial—The discovery by the defendant's agent, by reference to a paper which he had written, that he was mistaken as to a fact testified to by him at the trial, did not entitle the defendant to a new trial upon the

ground of "newly-discovered evidence," as the paper itself was not evidence, and both the defendant and his attorney knew they had such a paper.

J. M. Bigger for appellant; J. M. Bloomfield for appellees.

PILCHER v. McCOWAN, &c.

Filed February 23, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, affirming.

1. Limitation—On the 1st of January, 1866, appellant paid a replevin bond upon which he was bound as surety, and the bond was assigned to him. The bond matured February 21, 1864. The principal having died December 31, 1866, appellant, on the 12th of June, 1884, brought this action against his heirs to recover judgment for the amount paid by him (appellant) on the replevin bond, alleging that the defendants have each inherited from the principal in the bond lands of greater value than the amount of his debt. Held—That the action is barred, more than fifteen years having elapsed since the maturity of the bond. The statute of limitation applicable to replevin bonds applies instead of the statute which would be applicable to the implied contract if the bond had not been assigned.

2. Heirs—Limitation—An action against a personal representative upon a cause of action against the decedent is never barred until the expiration of at least one year after his appointment, and an action against the heir is never barred until at least two years after the decedent's death; and in neither case is the action ever barred at any time within which it might have been brought against the decedent.

In this case the statute had ceased to run in favor of the decedent at the time of his death, he having become a nonresident, but his heirs being residents of this State, the statute, upon his death, immediately began to run in their favor, and having thirteen years to run when the ancestor died, the action might have been brought against the heirs at any time within that period, but as it was not instituted for seventeen years after the ancestor's death, it is barred.

John E. Pilcher for appellant; Ward & McAfee for appellees.

MOREHEAD, &c. v. MAYER.

Filed February 23, 1887. Appeal from Henderson Circuit Court. Opinion of the court by Judge Ward, reversing.

Sales of personal property—A sold machinery to B, with the right to return. B notified A that he intended to return the property, but A stated that he would not accept it, claiming that B had forfeited his right to return. B nevertheless returned the machinery, and left a part of it at A's business house and a part at his warehouse, in A's absence. A afterward resold the property and received the money therefor. He now sues on the two notes for the purchase money first maturing, alleging that he has given credit for what the property sold for on notes not in suit, without stating

the amount. Held—That A, by reselling the property, accepted it as his, and can not now recover the purchase money.

Yeaman & Lockett for appellants; Cissell & Dudley for appellee.

SWIFT IRON AND STEEL WORKS v. SCHULTE.

Filed February 23, 1887. Appeal from Campbell Chancery Court. Opinion of the court by Judge Ward, affirming.

1. Defendants constructively served—Before judgment can be rendered against a defendant constructively summoned a bond must be executed as provided by section 410 of the Code; and no such bond having been executed in this case, it was not error to dismiss the action without prejudice.

2. A demand against the estate of a decedent must be verified and proved as required by the statute before judgment can be rendered either against the personal representative or the heir.

In this action against the heir the allegation that plaintiff sent its demand to an attorney, verified by affidavit, to be filed in a suit for the settlement of the estate did not dispense with filing the affidavit in this case, that the court might judge, from its terms, whether the law had been complied with.

Nelson & Washington for appellant.

COMMONWEALTH v. STAMPER, &c.

Filed February 23, 1887. Appeal from Carter Criminal Court. Opinion of the court by Judge Ward, reversing.

Indictment—Liquor selling—The indictment in this case charges that the defendants, "in the county and circuit aforesaid, did unlawfully, without a license so to do, sell spirituous liquors in civil district No. 4, to William Holbrook, after a majority of the legal voters in said district, at an election regularly held on the — day of November, 1874, had voted against the sale of spirituous, vinous or malt liquors;" that the vote had been compared and certified to the county court by the board of examiners of said election, and the certificate thereof entered upon the order book of said court as provided by law. Held—That the indictment is sufficient.

P. W. Hardin for appellant.

KENTUCKY CENTRAL R. R. CO. v. THRELKELD.

Filed February 23, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Railroads—Killing of stock—To enable the owner of stock who has received no compensation for fencing to recover half the loss where the stock has been killed or injured on the railroad track without negligence on the part of the company, it must appear that the track adjoined the lands owned or occupied by the owner of the stock, and that the stock was killed or injured by the locomotives or cars of the company. It is not sufficient that the stock, being frightened by the noises made by the train, ran upon the bridge and was injured.

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2. Same—The statute which provides that the killing or damaging of stock by the cars of a railroad company shall be prima facie evidence of negligence of the company does not apply unless there was an actual collision of the stock with the cars.

3. Same—The authority to operate a railroad includes the right to make the noises incident to the movement and working of its engines, and if the company exercises this right in a reasonable manner it is not liable, for that reason, for injuries to animals resulting from their becoming frightened by such noises.

4. Same—If stock on a railroad track is wantonly and negligently chased into a place obviously perilous, and killed, the company is liable, it matters not how the stock happened to be on the track.

Geo. C. Lockhart for appellant; D. A. Glenn for appellee.

COLVIN v. VANMETER'S EX'OR.

Filed February 23, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

If a legacy depends upon a condition precedent, no right can arise under the will unless the condition is performed; and it is not equivalent to performance that the condition was, or became, impossible, whatever may have caused it to be impossible.

A testatrix directed the payment of a legacy to C. if he should live with and take care of her, as he was then doing, until her death. C. sued the executor to recover the legacy, alleging that he took care of the testatrix until her death, and lived with her until she rendered it impossible for him to do so by ceasing to keep house and failing to provide any place for him to stay.

Held—That the petition does not show a right to the legacy.

Wilson & Sprigg for appellant; Montgomery & Poston for appellee.

ROBERTS' ADM'R, &c. v. PERCIVAL, &c.

Filed February 23, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

A distributee of a decedent's estate, who has executed a sale bond for property purchased by her at a sale under an execution in favor of the administrator against a debtor to the estate, seeks to enjoin the collection of an execution issued upon the sale bond upon the ground that there is due to her, as distributee, from the estate, which owes no debts, a much larger sum than the amount of the sale bond. It does not appear that the administrator is insolvent, or that his bond is insufficient. Held—That the petition should be dismissed and the injunction dissolved.

Hallam & Myers for appellants.

COMMONWEALTH v. JOHNSON.

Filed March 2, 1887. Appeal from Pike Circuit Court. Opinion of the court by Judge Barbour, dismissing.

1. Appellate jurisdiction—A judgment on a verdict of acquittal for the

alleged offense of carrying concealed a deadly weapon can not be reversed, the punishment prescribed for the offense being fine and imprisonment.

2. Same—An appeal can not be prosecuted by the attorney-general in a misdemeanor case for the purpose of having questions of law determined.

P. W. Hardin for appellant.

PINKSTON v. CHRISTERSON.

Filed March 2, 1887. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Slander—Variance—In an action for slander the plaintiff is not bound to prove the words precisely as charged. While it is not sufficient to prove words of a similar import merely, a variance in the mere form of expression is not material. The plaintiff in this case, a justice of the peace, had presided upon the examining trial of one Thomas Brown. The words charged were that plaintiff, in said examining trial, "had sold out to Thomas Brown on the bench." The plaintiff proved that defendant, in speaking of the trial, said "that he could not help thinking about said trial; that they had acquitted Tom Brown; that John Christerson, plaintiff, had sold out, and he was going to tell him so to his face." Held—That the words proved correspond with those alleged.

2. Proof of repetition—It was competent for the purpose of showing malice for the plaintiff to prove that the defendant repeated the slanderous words charged at various times and places before the institution of the action. And as the court admonished the jury each time the repetitions were proved that the plaintiff could recover for only one slander, and that the evidence of the repetitions was admitted on the question of malice only, the jury could not have believed that they could aggravate the damages.

3. Same—That the words charged having been repeated before the institution of the action, it was competent to prove them, not only for the purpose of showing malice, but in aggravation of damages. The admonition of the court, therefore, went further than the defendant had the right to require.

4. Damages—When the words charged are actionable per se the plaintiff is not restricted to such special damages as he may have proved.

5. Reversible error—There can be no reversal on account of the refusal of the court to allow a witness to answer a question asked him, there being no avowal as to what the witness would have responded.

6. Mitigating circumstances—Under the general issue the circumstances and occasion of speaking the words, or any matter short of actual proof of justification, is competent for the defendant in mitigation; and when the defendant has proved these mitigating circumstances the plaintiff will be permitted to rebut such evidence. But the plaintiff can not be allowed, upon his examination in chief, to introduce evidence in anticipation that the defendant will prove mitigating circumstances.

In this case the only issue made by the pleadings being whether the defendant spoke the words charged, it was error to allow the plaintiff to state

upon his examination in chief that he acted in good faith in discharging Brown, and to detail a conversation with his associate on the bench tending to support this statement.

W. C. & C. C. McChord for appellant; John W. Lewis for appellee.

COCHRAN'S EX'OR v. GERMANIA NATIONAL BANK OF NEW ORLEANS.

Filed March 2, 1887. Appeal from Kenton Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Claims against decedents' estates—Affidavit and demand—The statute requiring the verification of demand against the estates of decedents does not require that the affidavit shall state either the date or amount of the note or other demand, therefore, where the affidavit describes the demand as bearing a certain date, which does not correspond with the real date, the variance is not fatal.

2. Same—If upon its face the affidavit conforms to the statute, the plaintiff can not be denied his right to prosecute his action because he claimed more than he was entitled to recover.

In this case the demand was a note for \$404. The plaintiff, by his affidavit and also by his petition, claimed the full amount, but by an amended petition admitted that the note should have been for \$204, and that it was by mistake executed for the larger sum. Held—That the plaintiff can not be denied the right to prosecute his action for the smaller amount.

3. Usury—The defendant having alleged that the note sued on is without any good or valid consideration and is wholly for illegal and usurious interest, and these allegations being undenied, the judgment in favor of plaintiff must be reversed.

Charles Eginton and Raymond C. Gray for appellant; D. A. Glenn for appellee.

McCHORD v. BARKER, &c.

Filed March 2, 1887. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Attachments—When the debt is not due the clerk has no authority to issue the order of attachment until the attachment is granted, either by the court in which the action is pending or by a circuit judge or the presiding judge of the county.

2. Same—Neither a creditor nor a surety is entitled to an attachment against the debtor on account of technical insolvency, as provided in subsection 2 of section 194 of the Code unless the debt has matured before the institution of the suit.

3. Same—To entitle a creditor to an attachment upon that ground he must allege that he has not enough property subject to execution to satisfy the demands to secure which he seeks the attachment; that he has not enough property to satisfy that demand and another is insufficient.

In this case the plaintiff sought an attachment to secure two demands, alleging that the defendant had not sufficient property to satisfy both demands. One of the demands not being due he abandoned his attachment as to it. Held—That he has no valid attachment as to the other debt, not having alleged that the defendant had not sufficient property to satisfy it.

4. Same—The defendant having but \$240 worth of property, \$100 worth was a material part thereof, and his intention to remove from the State that much of his property, or its proceeds, authorized an attachment under subsection 6 of section 194 of the Code, the claims sued on in this case amounting to \$800.

W. W. & C. C. McChord for appellant J. W. S. Clements for appellees.

BENNETT v. HARMAN.

Filed March 2, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Barbour, affirming.

Counterclaim—If a defendant replies to an answer which contains a counterclaim he waives his right to object to it upon the ground that the caption does not state that it is a counterclaim.

Smith & Perkins for appellant; C. W. Lester for appellee.

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KENTUCKY COURT OF APPEALS.

(This case has been pending upon a petition for rehearing, hence the delay in the publication of the opinion.)

CORNELISON v. COMMONWEALTH.

(Filed December 11, 1886.)

1. An assault and battery is punishable in this State by either fine or imprisonment, or both fine and imprisonment, at the discretion of the jury, this being the common law punishment, which, in the absence of any statute upon the subject, must control. Nor should any limitation be placed upon the discretion of the jury in fixing the punishment. If the jury abuses its discretion by inflicting a cruel punishment, it is within the power of the court to set the verdict aside.

A fine of one cent and imprisonment for three years, for an assault with a cane and a cowhide, is held not to have been cruel or excessive punishment.

2. Punishment fixed by jury—In all cases where the citizen is indicted for a criminal or penal offense involving his life or liberty, or subjecting him to a fine, he is entitled to a trial by jury, and that tribunal must not only find him guilty, but also fix the punishment, although the common law may control as to the punishment, and the punishment may have been fixed at common law by the judge and not by the jury.

3. There are but three kinds of pleas to an indictment: 1. Guilty; 2. Not guilty; and 3. Former conviction or acquittal. It was, therefore, proper in this case for the court to refuse to allow the defendant to file a special plea.

4. Although there may be a plea of "guilty," the Commonwealth, to increase, or the defendant to mitigate the punishment, has the right to place the facts before the jury.

5. It was competent for the Commonwealth to prove the reasons assigned

by the accused for making the assault with which he was charged, and then to show that they had no foundation in fact.

6. Evidence—The defendant having been punished by imprisonment only, it is not material to inquire whether the court should have permitted to go to the jury the pecuniary condition of the accused and the size of his family, as the testimony, if admitted, could not have mitigated the punishment.

7. Same—It was not error to admit as evidence the statement of physicians as to the manner in which the injured man was affected, although the recital as to his symptoms came from him.

8. The manner in which the grand jury was selected is not the subject of revision by this court.

Lewis, J., dissenting. Holt, J., not sitting.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Pryor.

An indictment was returned into court by the grand jury of Montgomery county, charging that the appellant, John J. Cornelison, did "unlawfully, willfully and maliciously, and with the intent to wound and kill Richard Reid, in and upon the person of said Reid make an assault and battery, with a cane, stick and cowhide, and did then and there unlawfully, willfully and maliciously, with the intent aforesaid, strike, beat, bruise and wound him, the said Reid, with a cane, stick and cowhide, and inflict upon his head and body grievous and dangerous blows, whereby the said Reid was cruelly and dangerously beaten and wounded, and his life greatly endangered, and against the peace and dignity of the Commonwealth of Kentucky."

To this indictment the appellant pleaded not guilty, and the jury, after hearing the testimony, returned into court the following verdict: "We of the jury find the defendant guilty and fix his punishment at a fine of one cent and costs and imprisonment in the county jail for three years."

Before proceeding to the consideration of the principal questions made by the defense, the court below having overruled the motion for a new trial, it is necessary to notice some of the rulings of the court made before the plea of not guilty had been entered. A jury having been empaneled the defendant

offered to file a written plea disclaiming any intention to kill or seriously injure Judge Reid, at the same time confessing the assault and regretting its occurrence, filing a plea of guilty, and asking that the verdict be tempered with mercy. The court, at the instance of the attorney for the State, refused to permit the plea to be filed. The accused then offered to file this plea: "The defendant pleads guilty of the offense charged in the indictment, viz., a malicious assault and battery." The attorney for the State again objected, but consented that it might be filed, excluding the words "a malicious assault and battery." The objection to the plea was sustained, and the defense then moved to strike from the indictment the words "with the intent to kill and wound Richard Reid." This motion was overruled, and the plea of not guilty entered, but before any witnesses had been examined this plea was withdrawn and the following plea filed: "The defendant pleads guilty of the offense charged in the indictment." After this plea had been entered the Commonwealth's attorney had a witness called for examination, the accused objecting on the ground that no issue of fact had been made for the jury to determine; but the court adjudging that the State had the right to place the facts before the jury, although the plea of guilty, had been entered, the defendant then asked to withdraw his plea, and offered to plead not guilty. This the court refused, and the Commonwealth proceeded with the examination of the witnesses. To all of this the defendant objected, and by proper exceptions saved the questions. After the evidence on both sides had been heard by the jury the defendant, on his motion, was allowed to withdraw his plea of guilty and enter a plea of not guilty, upon which the verdict was returned, as already stated.

We perceive no error in regard to the preliminary motions made by the appellant in offering to file the various pleas, or any evidence, expressly or by inference, of any arbitrary action by the court in refusing to permit a special plea to be filed, or a departure from the ordinary mode of pleading pro-

vided by the Code. There are but three kinds of pleas to an indictment: 1. A plea of guilty; 2. Not guilty; and 3. A former conviction or acquittal.

When the plea of guilty has been entered the Commonwealth, to increase, or the defendant, to mitigate, the punishment, had the right to introduce testimony to enable the jury to render a true verdict when making inquiry as to the extent of the punishment. A plea, special in its character, for the purpose of avoiding such inquiry should not be allowed to be filed.

It is insisted by counsel that after the State had proven the admissions of the accused as to the character of the assault, and his reasons for making it, that it was incompetent to show that the words in red pencil were made by Judge Bowden and not by Reid; that no issue could be made as to the mistaken belief of the accused, after the reasons assigned by him had gone to the jury at the instance of the prosecution. We think it was competent, and clearly relevant to the issue. If true it was a mitigating circumstance to be considered by the jury; if untrue the appellant was acting at his peril in making an assault for reasons that did not exist, and the Commonwealth had the right to prove the reasons assigned by the accused, and then to show that they had no foundation in fact.

Whether the court should have permitted to go to the jury the pecuniary condition of the accused and the size of his family is an immaterial question on this appeal. He has been fined only one cent and the costs, and we know of no rule, where a party has been guilty of a public offense for which imprisonment is the punishment, subjecting him to a milder punishment than would be adjudged against another because the former has a family or is without any estate.

Nor do we see any error in admitting the statement of the physicians as to Reid's condition after the injury, or as to the manner in which he was affected, although the recital as to his symptoms came from the injured man; nor is the manner in which the grand jury was selected the subject of revision by this court.

The testimony in this case is in substance this; In the fore-

noon of the day on which the assault was made the witness, Col. Johnston, had invited the defendant, Cornelison, to the law office formerly occupied by Reid & Stone, but at the time the office of Stone, to consult about taking certain depositions. Reid was in the office at the time, and Cornelison read a copy of a letter that had been written, as Reid supposed, for the purpose of injuring him in the canvass he was then making for appellate judge. Reid, upon hearing the letter read, asked for some papers that the witness, Johnston, had, to enable him to reply to the letter. The papers were in the valise of the witness, and the valise was at the office of Cornelison. Cornelison told Reid to go to the office and he would show them to him. Reid responded that he had an engagement for the forenoon, but would call at defendant's office as he returned from dinner, at 2 o'clock. The assault was committed on the evening of that day, between 2 and 3 o'clock, the witnesses testifying that they saw Reid running to the store of Bean, and while there the defendant lashing him over the head and shoulders with a cowhide.

The account given of the attack upon Reid in the law office of the defendant, as he stated to witnesses who have testified on the trial, is as follows: The accused said that Reid, who was his counsel in a certain case, had betrayed him, and induced the other judges (Reid being then one of the Superior Court Judges) to render a decision against him affecting his character, and he had the evidence of it in his own handwriting; that at the time of the attack he presented the writing to Reid, and asked him if he had written it, to which he responded "no." The defendant then told him he was a liar, and after some words had passed struck him once with his cane over the head, and attempted to inflict other blows that were warded off by Reid. When Reid attempted to get away he (the defendant) pulled a cowhide from under his clothes, and struck him about fifty licks. Reid then made for the door but defendant headed him off, and forced him under the stairway in a corner of the office, and then struck him about

twenty-five more blows with the cowhide; that Reid made no resistance, but begged, and, finally escaping, was pursued by the defendant into the street and into Bean's store, where the lash was again applied.

Cornelison had applied for a rehearing in the case where the judgment had been adverse to him, and found on the margin of the record in that case, written with a red pencil, the words "why," "his fee," and "to his own statements." He believed the writing was that of Reid, and exhibited it to two or more persons, before the assault was made, who were familiar with his handwriting, who stated to him, and also on the trial of this case, that they believed it was Reid's handwriting. He thought from the marginal notes that his counsel had proven treacherous, and had the case decided against him. Judges Bowden and Richards, who were associated with Judge Reid on the bench—the one (Bowden) stated that he made the marginal notes; that they were written by him. Judge Richards states that these marginal notes are in Bowden's handwriting, both testifying that Judge Reid had said nothing about the case until after the opinion had been delivered.

The principal objection made by counsel for the accused to the judgment of conviction, and the one to which the attention of this court has been particularly called, arises from the instruction given at the instance of the attorney for the State, authorizing the jury, upon their finding the defendant guilty, "to fix his punishment by fine in any sum, or by imprisonment in the county jail for any period of time, one or both, at their discretion."

It is insisted, first, that by the rule of the common law a common assault, or a common assault and battery, was punished by fine only; second, that if the common law authorized imprisonment as well as the imposition of a fine, such a doctrine was not in force in this State at the time of the commission of the offense, having been repealed by the statute; and if in force, the judge imposed the punishment at common law and not the jury, and for that reason the jury had no power to fix the punishment. In considering these ques-

tions it is proper to determine in the first place whether, by the rule of the common law, the punishment for an assault and battery was by fine only; for if so a reversal necessarily follows. All indictable misdemeanors were punished at common law by fine and imprisonment, one or both, at the discretion of the judge, and where the private injury resulted in a public wrong the party charged with the offense, if found guilty, his punishment was fixed by the judge and not by the jury. This common law doctrine, when not in some manner modified by statute, except as to the tribunal designating the punishment, has been regarded as the law in this State since the organization of the State judiciary, and while such a practice has become a part of our jurisprudence, and been so recognized by the circuit judges of the State as far back as the memory of the oldest practitioner goes, it is now maintained that no such common law rule ever existed.

The judicial history of this State is certainly a persuasive, if not conclusive, argument on the question, but the importance of the case requires a careful review of the authorities, that the point involved may be finally settled. It has not been contended by the attorney for the State that the same judicial tribunals as they existed at the common law in England followed its rules of practice in the administration of justice in a government like ours. Under our State Constitution neither the life nor the liberty of the citizen is made to depend, when charged with crime, as to the extent of the punishment, upon the arbitrary will of the judge, but in all cases when indicted for a criminal or penal offense, involving his life or liberty, or subjecting him to a fine, he is entitled to a trial by jury, and that tribunal must not only find him guilty, but also fix the punishment. That punishment, when not regulated by statute, must be as and by the rule of the common law; so we perceive no reason for reversing this case because at common law the judge and not the jury imposed the fine or fixed the term of imprisonment.

There are no degrees of the offense of assault and battery except that in imposing the punishment the circumstances of

the one case demand a greater punishment than the other. A mere assault is not as high an offense against the law as when accompanied with a battery, and an assault and battery with the intent to rob or murder is a more aggravated assault than a mere assault and battery, and it may be said in this way that there are degrees of the offense. The punishment is graded by the enormity of the offense.

The one becomes aggravated by reason of the attendant circumstances, and in such a case appeals to the jury, as it did the judge at common law, for a heavy sentence or punishment. It is true that in England some assaults were deemed so aggravated when made upon those in high position as to become the subject of statutory enactment, where the party guilty lost his entire estate and was condemned to perpetual imprisonment. We have no such law in this State, nor has the legislature the power, if disposed, to inflict such a punishment.

The case before us is an assault and battery by one private citizen upon another private citizen—by one lawyer upon his brother lawyer—and in that light only can this case be considered.

The case of the Commonwealth v. Simmons, 6 J. J. Marshall, 614, relied on by the defense, was brought to this court by an appeal when a fine only had been imposed, and the question presented was as to the sufficiency of the indictment. This court had no jurisdiction where the punishment was by imprisonment, and in discussing the question the court held, through Chief Justice Robertson, that it was a simple assault and battery, and the punishment being a fine only the court had jurisdiction. He quotes from Hawkins' P. C., to the effect that "assaults and batteries may be punished not only by action at the suit of the injured party, but also by indictment at the suit of the king, wherein he shall be fined according to the heinousness of the offense." This quotation is from Bacon's Abridgement, 1st volume, and no further comment made by either author.

At common law the judge might fine or imprison at his dis-

cretion, or both fine and imprison, and where no aggravating circumstances attended the commission of the offense the judges there, as the juries here, impose the slightest penalty, which is the fine, because in legal contemplation a simple assault did not demand severer punishment. In this light the question was doubtless considered by the court, or the attention of the court (the question arising only on demurrer) was not called to the authorities on the subject, as is evident from the subsequent ruling of the court in the case of *Usher v. Commonwealth*, 2 Duavll, 394. Usher was indicted under the statute for shooting at one Morris with the intent to kill or wound him, without inflicting a wound, the statute providing that in such a case the offended shall be fined not exceeding \$500, and imprisoned not less than six nor more than twelve months.

On the trial the proof showed only an attempt to shoot, by presenting at Morris the gun or pistol, but as there was no statute punishing the offense of attempting to shoot it was held that as to the offense the common law was still in force, and the circuit court holding that as the attempt to shoot was a degree of the offense mentioned in the statute, instructed the jury that they could find the party guilty and fine and imprison him for a period not longer than the time fixed by the statute. The jury imposed a fine only of \$266. This court, in passing on this point (Chief Justice Robertson then on the bench) held that as to this offense the common law punished the party by fine or imprisonment, or by fine and imprisonment, at the discretion of the jury, and that although not limited by statute as to the punishment, due respect to the statute required that the punishment for an attempt to shoot should not be greater than that imposed for the actual shooting, and added: "If the court erred in prescribing this limit it was an error not prejudicial, but favorable to the defendant."

Leaving the decisions of this court and going to the elementary writers on the subject, Mr. Bishop, in his work on Criminal Law, vol. 2, p. 45. says: "Practically, therefore, we look

upon assault as aggravated both when it appeals to the judicial discretion for a heavy sentence and when it constitutes a part of a higher crime. The law may, therefore, be said to deem the assault more or less enormous, according to the facts of the particular transaction. And the aggravating facts, even when they do not elevate the assault to a distinct crime, are usually set forth in the indictment as a guide to the court in pronouncing sentence. If they demand, in matter of law, a higher punishment, they must be so set out." Says the same author: "Assault is misdemeanor, not felony. It is, therefore, punishable at the common law by fine and imprisonment, to which may be added bonds to keep the peace. Even aggravated assault is, at common law, a mere misdemeanor, but by force of statutes some of the aggravations are, in some of our States and in England, made felonies." (Bishop on Criminal Law, vol. 2, p. 56.)

In treating of the same subject the author, in his first volume, page 549, says: "These offenses (assault and battery) are generally spoken of in the books as breaches of the peace, which, in a qualified sense, they are. But they are more. For the common law deems that one assumes toward another unfair ground, and gives occasion for public interposition, when wrongfully undertaking to injure him by any kind of physical force."

Russell on Crimes, volume 1, page 1,030, says: "Whenever a count for misdemeanor contains a charge of assault, accompanied with circumstances of greater or less aggravation, the jury may find the defendant guilty of a common assault, and acquit him of the circumstances of aggravation. This offense was punishable as a misdemeanor, and the punishment usually inflicted was fine, imprisonment and the finding of sureties to keep the peace."

Mr. East, in his Law of the Crown, in treating of felonious, malicious and unlawful assaults upon the person, proceeds to say that before mentioning assaults of an aggravated kind he will advert to what are called common assaults and batteries.

He defines such an assault to be "any attempt or offer, with

force or violence, to do a corporal hurt to another, whether from malice or wantonness," etc., and then proceeds: "These offenses are punishable by fine and imprisonment and finding suréties, or other ignominious corporal penalties." (East's Crown Law, vol. 1, p. 406.)

Archbold's Criminal Practice and Pleading, volume 2, page 66, says as to assault: "Misdemeanor at common law. Fine or imprisonment, or both."

Says Mr. Blackstone, as to assaults and batteries, etc.: "They are indictable and punishable with fine and imprisonment, or with other ignominious corporal penalties, where they are connected with any very atrocious design. As in case of an assault with intent to murder." (Book 4, p. 216.)

Wharton on Criminal Law, volume 2, section 1,287: "An assault with intent to commit murder is now, at common law, considered a misdemeanor only, and although it may be a high misdemeanor it is not subject to any additional punishment as such, but only such as, in the discretion of the court, may be inflicted on other misdemeanors at common law."

We think it needless to multiply authority as to the punishment at common law in this class of cases, and will proceed to consider whether that punishment has been repealed by legislative enactment.

A statute of this State, embodied first in the Revised Statutes, and now in the General Statutes, provides that "a common law offense for which punishment is prescribed by statute shall be punished in the mode so prescribed." (General Statutes, chapter 29, article 1, section 3.)

It is maintained that the legislature of the State, as far back as the year 1802, gave jurisdiction of riots, routs, unlawful assemblies and breaches of the peace to justices, and limited the punishment to a fine not exceeding twenty dollars, and that, an assault and battery constituting a breach of the peace, the limitation to the punishment was regulated by that statute until repealed. (Act of December 21, 1802, 2 vol. M. & B., 1,390.)

By a subsequent enactment of February 11, 1809, the com-

mon law in relation to riots, routs, unlawful assemblies, assaults, batteries, affrays, etc., was restored, providing that persons could be indicted and punished at common law as hertofore, and further providing that no person or persons should be twice punished for the same offense. (2 vol. M. & B., 1,391.)

In the year 1838 an act, entitled an act to explain the law concerning riots, routs, affrays and unlawful assemblies, provided "that on the trial of any indictment for any of said offenses it shall be in the discretion of the jury by their verdict to award either fine or imprisonment, or both." (Loughborough, 520.)

Section 4, article 19, chapter 29 of the General Statutes provides "that riots, routs, unlawful assemblies, affrays and breaches of the peace may be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, one or both, in the discretion of a jury."

These enactments have been specially referred to for the reason that the act of 1802 for suppressing riots, routs, unlawful assemblies and breaches of the peace, similar in its provisions (save the punishment) to the clause of the General Statutes imposing a fine of not exceeding one hundred dollars and imprisonment not exceeding fifty days, has been the subject of judicial construction in the case of *Ely v. Thompson*, 3 Mar., 70, and the *Commonwealth v. Miller*, 5 Dana, 320, and again approved by this court in the case of the *Commonwealth v. Bright*, 78th Ky., 238.

The case of *Ely v. Thompson* was an action brought by a free person of color against a justice of the peace for having, by his judgment, inflicted upon him thirty lashes for lifting his hand in opposition to a white man, and the question presented was, had the act authorizing such punishment been repealed by "an act to suppress riots, routs, unlawful assemblies and breaches of the peace?" the act expressly repealing all laws coming within its purview. It was in that case held that affrays, assaults and batteries were within the purview of the repealing act, and embraced by its provisions, and for that

reason, as well as others assigned, there was no justification for the wrong perpetrated on the plaintiff.

The case of the Commonwealth v. Miller, 5 Dana, 320, presented the question whether a fine imposed by a justice for a breach of the peace was a bar to a further prosecution for assault and battery, and it was so held.

The protection of the right of personal security becomes involved in the proceedings when the Commonwealth undertakes to punish the private wrong for the public welfare, and while the State may elect to proceed for a mere breach of the peace caused by the assault, when the fine was originally limited to twenty dollars, and now to one hundred dollars and fifty days imprisonment, yet if the indictment is for the assault and battery the punishment as to fine and imprisonment governed by the common law is within the discretion of the jury.

It would be inconsistent with natural reason to say that for an offense of this sort the party injured is to seek redress alone by his civil action, or that in a government of law, where the Commonwealth interposes for the preservation of personal security, one of the absolute rights of every freeman, that any one of its citizens can apply the cowhide to the body of his neighbor and then satisfy the demand of the State by the payment of his money for the privilege.

The punishment inflicted in all such cases should be commensurate with the wrong done, not to the individual but to the public.

In the case of the Commonwealth v. Bright, above, this court held that "when the Commonwealth elects the offense for which she will try the accused for an act or omission, and does try him, she can not carve out another offense of the same class, but of higher degree, and try him again."

Such was the effect of the decision in the case of the Commonwealth v. Hawkins, 11 Bush, 608.

The case upon which those decisions rest is that of the Commonwealth v. Miller, 5 Dana, 320, where it is expressly held that while the magistrate had jurisdiction to impose a fine for

a breach of the peace it was "not the only deliction for which an indictment could be maintained for the assault and battery," but as the assault constituted the breach of the peace it was a bar.

But we are not left at sea in the construction of these statutes limiting the fine in case of a breach of the peace, first to twenty dollars and then, by the General Statutes, to one hundred dollars and fifty days imprisonment.

Chief Justice Robertson delivered the opinion in the case of *Dickerson v. Commonwealth*, 2 Bush, 1, where the fine for an assault and battery was two hundred and fifty dollars, and in the case of *Chandler v. Commonwealth*, 1 Bush, 41, the fine was fifteen hundred dollars for the assault, showing plainly that these statutes afford no guide to the infliction of punishment in such cases, and the Commonwealth is left to punish the offender under the common law, which is fine and imprisonment, or either or both, at the discretion of the jury.

The remaining question to be decided is one that has received more consideration than any other point involved, and that is as to what limitation, if any, is or should be placed upon the discretion of the jury in fixing the punishment?

Our statute in regard to crimes and punishments provides that "if any person shall, in a sudden affray, or in sudden heat and passion, without previous malice, and not in self-defense, shoot and wound another person with a gun or other instrument, * * * or shall, in like manner cut, thrust or stab any other person with a knife, dirk or other deadly weapon, without killing such person, he shall be fined not less than fifty nor more than five hundred dollars, or confined in jail not less than six months nor more than one year, or both, in the discretion of a jury." (General Statutes, chapter 29, article 17, section 1.) Where the shooting is with intent to kill, without wounding, the confinement is the same. Where malice exists and a wound is inflicted with the intention to kill, not producing death, the punishment is confinement in the penitentiary for not less than one nor more than five years.

It is urged that in the present instance the jury is invested with the power to deprive the accused of his whole estate, or imprison him for life, for an offense less in degree than a felony, and less in degree than in shooting and wounding in sudden heat and passion, and, therefore, some limitation should be placed upon this judicial discretion. In the first place the punishment by imprisonment for life for offenses of this character could not be inflicted under any rule of the common law, and it is only in cases where the offense by statute is made a felony that this severe punishment was annexed, and then for assaults on those high in authority, in either church or State.

Here no such questions can arise, but a jury of twelve men, that has, since the existence of Magna Charta, been invested with the discretion, under the guidance of impartial judges, of passing on the personal liberty of the citizen and of life itself, is called upon to fix, in its discretion, the extent of the punishment that shall be inflicted for the commission of an aggravated assault and battery—a tribunal connected with the administration of justice that is always ready to protect those charged with offenses from any attack of arbitrary power. We know of no tribunal where such discretion could be more safely lodged. There is a manifest difference between the effect of an imprisonment for high crimes and the punishment for a misdemeanor. The one is consigned to a felon's cell at hard labor, while the other is required to pay a fine and imprisoned in the jail of his county.

Some of the offenses known as misdemeanors were of such frequent occurrence in this State as to attract legislative attention; such as shooting and wounding another in sudden heat and passion, or shooting at another without inflicting a wound. Statutes have been passed imposing penalties severe in their character in such cases, for the reason that under the common law rule slight punishments were too often imposed by courts and juries; still those penalties are not to control or fix a limit to the punishment for aggravated assaults and batteries, or other high misdemeanors, where no statute has inter-

posed. It is not necessary to draw a parallel between the enormity of the offenses mentioned and the one being considered.

There is a limitation for the protection of the citizen against all excessive punishment. That limitation is found in the second and seventeenth sections of the Bill of Rights, the second section providing "that absolute arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Section seventeen provides "that excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." For malicious shooting and wounding with the intent to kill the limit to the punishment being five years, and the offense a felony by our statute, might afford the judge on the bench some guide on the motion for a new trial in determining whether or not the jury had abused its discretion by the verdict in this case. No limit has been fixed by the legislature to the punishment for this offense, and the court having no power to designate the limit, the jury exercising its discretion, it was then within the power of the court to set the verdict aside if that discretion had been abused by the infliction of a cruel punishment. Was the punishment cruel and excessive?

If the law-making power (the legislature) had undertaken to regulate the punishment for an assault and battery attended with the lash of the cowhide on the backs of its citizens, what would likely be the fine and imprisonment imposed? This was the question addressed to the court and jury trying this case, and in the exercise of their legal discretion they have annexed a punishment that this court will not disturb. Neither the court nor the jurors could have closed their eyes to the cruelty and enormity of the offense committed. None more humiliating or degrading could have been inflicted upon the person of the injured man, and nothing more calculated to render the life of the wrong-doer more insecure. Such an injury strikes at the very existence of society, and the punishment imposed is only commensurate with the injury done. To have taken the life of the assaulting party would have made

Reid guilty of a still greater crime, and the submission by him, without resistance, to the cruel blows, whether from his peculiar mental and physical condition or his respect and reverence for the law, makes the necessity the greater for vindicating the wrong. The law should always inflict the punishment and not the party who has suffered the injury.

Judgment affirmed.

Judge Holt not sitting.

Judge Lewis delivered the following dissenting opinion:

Under an instruction by the court, in substance that if they believed the defendant willfully and maliciously, with intent to beat, wound or kill Richard Reid, made an assault upon him with a cane, stick or cowhide, by striking, beating or wounding him, they must find him guilty of an assault and battery, and fix his punishment by fine in any sum, or by imprisonment in the county jail for any period of time, one or both, in their discretion, the jury in this case returned a verdict of guilty, and fixed the punishment at a fine of one cent and imprisonment in the county jail for three years.

I can not concur in, but dissent from, the opinion of the majority of the court sitting in this case.

The offense for which the defendant was indicted and tried is assault and battery, always deemed and treated at the common law as a misdemeanor, and never intended by the legislature to be punished otherwise. But under the instruction of the court the jury was authorized, at their discretion, to punish the defendant by fine to the amount of his entire estate then owned, or that he might ever acquire, and by imprisonment for an indefinite period, as well twenty-one as three years. And the punishment actually imposed by the verdict of the jury is, as compared with the following offenses made felonies, greater than the minimum punishment provided by statute for larceny, robbery or burglary, and greater than can be imposed in any case, whatever may be the circumstances, for maliciously assaulting, with a felonious intent to commit

robbery upon a person; it is greater than that for unlawfully taking, without her consent, an unmarried girl under the age of fourteen years out of the possession of her parents, without their consent; as great as the maximum punishment for detaining a child under ten years of age, with intent to deprive the parent of, or steal any article of value from the person of, such child; and greater than the minimum punishment for unlawfully detaining a woman against her will, with intent to marry, or have her married to another, or with intent to have, or that another may have, carnal knowledge with her; it is greater than the minimum punishment for maiming the person or maliciously shooting and wounding, or maliciously cutting or stabbing, with a knife, sword or other deadly weapon, with intent to kill; or for the despicable offense of maliciously administering poison to, or attempting to poison, another when death does not ensue.

If that instruction be the law a person may, for the offense of assault and battery, be lawfully imprisoned for a period of time terminated only by his death.

It seems to me when a judgment comes before us thus obliterating the line dividing felonies from misdemeanors, and doing such violence to the reason and analogy of the law, it is time to look to the Constitution under which we live.

In section 2, article 13 of the Constitution, it is declared "that absolute arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic—not even in the largest majority."

The power to punish, under semblance of authority, by fine and imprisonment, at discretion, without any fixed rule of law to limit the amount or duration, whether exercised by one or more than one, is arbitrary power in the meaning of the Constitution.

It does not make any difference whether the punishment be confinement in the penitentiary or in the county jail; for to confine a person in either is to deprive him of his liberty, which can not be done in any case arbitrarily.

Nor does the fact that such power is lodged with juries, and

its exercise made subject to revision by courts, alike freed from legal control or restraint, afford the certain and complete guaranty against oppression and wrong intended by the Constitution. For common experience teaches that a jury may sometimes drift with a strong current of unreasoning popular prejudice, and a timid judge may listen to clamor or bend to pressure.

There can be no security for life, liberty and property without laws conservative of the fundamental principles of our government.

The safety of society and of each member of it requires, and from the beginning the uniform policy of the legislature has been, in accord with the Constitution and sentiments of the people, to provide by law that punishment for public offenses be inflicted only within prescribed maximum and minimum limits. And if the offense of assault and battery may now be punished by a different rule it is an exception, and the fact that there is no reason whatever for such anomaly should, according to a safe rule of construction, be now regarded as conclusive it was not intended to exist.

Appellant's counsel contend that at common law, which, it is argued, governs in this case, the offense of assault and battery is punished by fine only; and to sustain the position cite the case of *Commonwealth v. Simmons*, 6 J. J. M., 614, decided in 1831, Judge Robertson delivering the opinion. At the time that case was decided the Court of Appeals had no jurisdiction of a penal offense for which there was any greater punishment than a fine. It was, therefore, deemed by the court necessary to determine whether assault and battery, for which Simmons had been indicted, was punished at common law by both fine and imprisonment, or by fine only. And the question being thus directly before the court it was held that the offense could not be punished by imprisonment at all, and consequently the court took jurisdiction of the appeal in that case.

By the other side we have been referred to the case of *Usher*

v. Commonwealth, 2 Duvall, 394. decided in 1866, Judge Marshall delivering the opinion.

In that case Usher was indicted for the statutory offense of shooting at another with intent to kill or wound such person, denounced by section 1, article 17, chapter 28, Revised Statutes, and likewise in the General Statutes, the punishment for which was a fine not exceeding \$500, or imprisonment not less than six not more than twelve months, or both, in the discretion of the jury.

But the evidence on the trial did not show there was an actual shooting, but only that in the course of a violent assault and battery committed by Usher upon one Morris, or immediately upon its suspension, he got a pistol and, aiming it at Morris, who was retreating from him, snapped it as many as three times.

The circuit court instructed the jury in that case that if they found the defendant guilty of unlawfully attempting to shoot at another to fix his punishment at imprisonment not exceeding twelve months, or fine not exceeding \$500. And this court, in passing on that instruction, said: "We think in prescribing the limit for the punishment in this case the court paid no more than due respect to the statute."

It is true it was said in the same opinion that the offense of attempting to shoot another, without actually shooting, is not described not punished by statute, but was an offense at the common law and punished at the discretion of the jury.

No notice was taken by either court in that case of the violent assault and battery committed on the same occasion. But both inadvertently fell into an error in assuming that attempting to shoot at another was, at the common law, technically a generic offense. The offense of which Usher was proved guilty, and in relation to which the instruction was given, was an assault committed by presenting and snapping his pistol at Morris within carrying distance, and of a lower degree than the one for which he was indicted. And, being an assault, it was punished at the common law by imprisonment, or it was not so punished.

In the Simmons case the question was directly and necessarily before the court and expressly decided.

In the Usher case the question of imprisonment was not before the court, nor necessary to be decided, for the verdict of the jury was for a fine only.

Moreover the opinion in the Simmons case is consistent, while that in the Usher case is not. For the kind and degree of punishment for assault and battery must, from necessity, be, and is, regulated exclusively by common law rules, or exclusively by statute, otherwise the attempt to inflict it in the manner and to the extent provided by one would violate the other, unless they were identical, in which case the common law would be obsolete. If, then, the common law governs, and the punishment may be imposed at the discretion of the jury, it is so in virtue of a statute putting the common law in force, which respect for another statute will not authorize the court to disregard. It was, however, the only way to escape the absurd result of holding that the common law governs at all as to the punishment for assault and battery, whereby the greater punishment may be inflicted for the lesser offense.

I am aware that there are other cases decided since 1831, hereafter noticed, in which judgments for fines exceeding the statutory limit have been affirmed, but there has been no one directly involving the question of imprisonment for assault and battery.

There appears to be some disagreement amongst text writers as to the ancient mode of punishing for assault and battery, and authorities are cited by counsel for the Commonwealth, and also in the opinion of the majority, for the purpose of showing that the offense is punishable at common law by both fine and imprisonment, and that the decision of this court in the Simmons case should not now be adhered to.

But whether the weight of authority as to the common law be one way or the other, and whether the accused in this case should not have the benefit of whatever doubt there may be, I

deem immaterial, for in my opinion the punishment is regulated wholly by the statutes of this State.

It is, however, proper to stop and consider seriously whether, assuming as the majority does that the punishment is determined by the common law, we should now, in order to affirm a judgment of unexampled severity, overrule and disregard the only judicial exposition of what the common law on the subject is ever made by this court in any case when the question of imprisonment was necessarily and directly involved and decided.

Former decisions of this court, by which rules regulating property rights have been determined and settled, are, even when deemed erroneous, seldom if ever disturbed. It seems to me there is at least as good reason why a court of last resort, having once decided that a person could not, according to a particular law, be imprisoned, should not afterwards change its ruling without a change of the law.

In pursuance of the obvious policy of every State to provide by statute the mode and degree of punishment for each public offense committed within its own limits the legislature commenced, immediately after the organization of the State government, to provide a penal code adapted to the condition and necessities of the Commonwealth, and now there is scarcely an offense punishable at all that is not punished according to the statutes of the State. Is it to be presumed the legislature has, from the beginning, purposely omitted the offense of assault and battery, of perhaps more frequent occurrence than any other, and left it to be regulated by the common law, the meaning of which is the principal subject of dispute even in this case?

By an act approved December 21, 1802, it was provided that if any riot, rout, unlawful assembly of the people or breach of the peace be made or committed the offender should be arrested, and on failure to give bail for his appearance before a justice of the peace for trial he should be put in jail, and if found guilty by a jury the justice should proceed to punish him by fine, not exceeding \$25. It was further provided that

on default of the officers to proceed against the offender in the time and manner prescribed in the act "said offenses shall be punished as heretofore."

An act of December 20, same session, is as follows: "Whereas, A mode of proceeding and punishing offenses has been provided by an act of Assembly, differing in some cases from that which had before been provided by the common law or by English statutes, it is enacted that in such cases the provisions of the common law or of the English statutes shall be, and are hereby, repealed."

And by a third act of December 22, same session, it was provided that "all laws and statutes which provide for the punishment of offenses, for which other punishments are provided by act of Assembly, are repealed."

But in 1809 an act was passed providing "that the common law in relation to riots, routs, unlawful assemblies of the people, assaults, batteries, affrays and breaches of the peace shall be, and the same is hereby, revived and declared to be in full force, and that any person or persons guilty of any of the aforesaid offenses may be indicted and punished at common law as heretofore, any law to the contrary notwithstanding, provided that this act shall not be so construed as to subject any person or persons to be twice punished for the same offense."

Section 3, article 1, chapter 29, General Statutes, is as follows: "A common law offense for which punishment is prescribed by statute shall be punished only in the mode prescribed."

The title of article 19, chapter 29, is "Riots, Rout and Breaches of the Peace," and the first three sections contain substantially the same provisions for the summary arrest of offenders as provided in the act of December 21, 1802, and the same as were in the Revised Statutes.

Section 4 relates to the trial of persons arrested, and provides that if the jury believe the defendants, or any one or more of them, guilty they shall be severally fined in a sum not exceeding \$100, or imprisoned not exceeding fifty days, or both so fined and imprisoned, at the discretion of the jury.

Section 6 of the same article is as follows: "Nothing in this article shall be construed to repeal the common law in relation to riots, routs, affrays, unlawful assemblies or breaches of the peace, which offenses may be punished as and by the common law, as heretofore."

The General Statutes differ from the Revised Statutes only in regard to the extent of punishment, which in the latter is limited to \$30 and fifteen days imprisonment, and differs from the act of December 21, 1802, as to the extent of punishment and in giving to the jury, instead of the justice of the peace, the discretion to fix it. But the policy of limiting the punishment has been uniform and consistent throughout.

The principal question then is whether assault and battery were intended by the legislature to be included by the term "breach of the peace."

Assault and battery, one being an unlawful attempt or offer, with force, to do a corporal injury, and the other the actual use of such force, constitute, singly and combined, in law and in fact, a breach of the peace.

An assault has always been held by this court a breach of the peace. And if it be more it is so in the sense of being a personal injury, for which a civil action may be maintained, or being accompanied with an intent to do some act which is of a higher grade of offense than a breach of the peace.

There is no distinct offense known as an aggravated assault. In England assaults are called aggravated because committed in certain places or against privileged classes, for which specific punishments were provided, that have no place here: There are assaults with intent to kill, indicated by the use of means which ordinarily may produce death, such as are called deadly weapons, or with intent to rob, commit rape, etc., all of which are specially provided for by statute.

The offense charged in the indictment in this case is a misdemeanor, and for that, and not a felony, can the defendant be punished.

In Commonwealth v. English, decided in 1810, 2 Bibb, 80,

the defendant was indicted for a battery, and though the judgment, which was for a fine exceeding the statutory limit, was affirmed, yet the offense was recognized by the court as coming under the head of breach of the peace, and being provided against by the act of 1802.

In *Ely v. Thompson*, 3 A. K. M., 70, assaults and batteries were held to be embraced by the act of 1802.

In *Commonwealth v. Miller*, 5 Dana, 320, the same construction was given to that act, the court using this language: "A judgment rendered under the act of 1802 for a breach of the peace, committed by an assault and battery, is a bar to an indictment for the same assault and battery."

In *Commonwealth v. Foster*, 3 Met., 1, it was held that the Revised Statutes on the subject of riots, routs and breaches of the peace were a substantial copy of the act of 1802, and a fine assessed for a breach of the peace was a bar to a subsequent indictment for an assault and battery.

In *Commonwealth v. Hawkins*, 11 Bush, 603, and *Commonwealth v. Bright*, 78 Ky., 238, the same construction was given to the General Statutes.

It thus appears that this court has uniformly held that by the term "breach of the peace," as used in the act of 1802, the Revised and General Statutes, the offense of assault and battery is embraced, and a conviction for one is a bar to the prosecution for the other on account of the same transaction.

We have been referred to several cases of assault and battery, in each of which the court affirmed the judgment exceeding the limit fixed by statute; the first, *Bosley v. Commonwealth*, 7 J. J. M., 598 decided in 1832, and the last, *Dickerson v. Commonwealth*, 2 Bush, 2, in 1867, the other being in 12 B. M., 25, and 1 Bush, 42. But in none of them does the question of the unlimited discretion of the jury appear to have been raised or discussed.

Nor has there been an attempt, in any of the cases mentioned, to construe the statutes so as to reconcile the apparent conflict between the acts of 1802 and 1809, nor that between

section 3, article 1, and section 6, article 19, chapter 29, General Statutes, which are similar to corresponding sections in the Revised Statutes. But since the case of *English v. Commonwealth*, decided in 1810, where the acts of 1802 were construed without reference to the act of 1809, it seems to have been strangely assumed that if the trial for assault and battery was before a justice of the peace only the punishment fixed by statute could be imposed; while the common law, which prescribed a totally different and unlimited punishment, alone governed in the circuit court. And it has thus resulted that, according to the ruling of this court previous to 1874, when the case of *White v. Commonwealth*, 10 Bush, 557, was decided, the punishment to be imposed for assault and battery depended rather upon the tribunal before which the offender was tried and the law under which he was tried, statute or common law, than upon the merits of the case.

In the case of *White v. Commonwealth* the defendant was indicted and tried for a breach of the peace, and adjudged to pay a fine of \$250. And the only question in the case grew out of the amount of the fine assessed, which was in excess of the limit of \$100 prescribed in section 4, article 19, chapter 29, General Statutes. And the judgment was reversed upon the sole ground that the lower court erred in instructing the jury they might assess the fine at their discretion.

In that case, as therein stated, the court was led by the apparent conflict between section 3, article 1, and section 6, article 19, for the first time to look into the history of legislation in this State on that subject, and after a thorough investigation decided that the act of 1809 was intended to give the circuit courts jurisdiction concurrent with justices of the peace of prosecutions for offenses enumerated in that act (assault and battery being included), and not for the purpose of subjecting offenders to a greater punishment in the one court than in the other; and for the same purpose section 6, article 19, which is similar to the act of 1809, put into the General Statutes. Said the court: "Section 4, article 19, chapter 29, General Statutes, prescribes a punishment for breaches

of the peace; and if it be held that under section 6 of the same article a greater punishment than is thus prescribed can be inflicted under indictment in the circuit court, as and by the common law, the latter section is brought in to direct conflict with section 3, article 1, which provides that a common-law offense the punishment of which is prescribed by statute shall only be punished in the mode so prescribed."

As said farther in the opinion, the construction given "harmonizes section 6, article 19, with section 3, article 1, which could not be otherwise done, and it also prevents the legislative anomaly of providing different punishments for the same offense, which we can not presume the legislation intended."

It is obvious that the construction of the statutes given in that case is the only one by which the apparent conflict between the two sections mentioned can be harmonized and each of them be left in full force. It is equally obvious if full force is given to section 4, article 19, the language of which can not be misunderstood, that for none of the offenses mentioned in that article can either fine or imprisonment be imposed beyond the limits therein prescribed. An assault and battery being, according to the ruling of this court, a breach of the peace in the meaning of that article, it inevitably follows that the instruction given in this case and the verdict of the jury are in violation of section 4, article 19.

The decision in the White case is utterly inconsistent with, and in effect overrules, all the preceding cases holding that fine and imprisonment for assault and battery may be imposed without limit, at the discretion of the jury. It has been acquiesced in by the legislature and adhered to by this court for twelve years, and was the law, as held by this court, when the offense in this case was committed, and being in harmony with the Constitution and the legislative policy of the State, as well as consistent and just, should not now be overruled to the prejudice of personal liberty, which must be done if the judgment in this case is affirmed.

Wm. Lindsay, Wood & Day, R. A. Mitchell, H. M. Wood-

ford, J. H. Hazelrigg, S. S. Gaitskill, H. Clay McKee, M. S. Tyler, W. P. Thorne and Turner & Son for appellant.

P. W. Hardin, John Rodman, H. L. Stone, Hargis & Eastin, W. J. Hendrick and W. R. Patterson for appellee.

HARPER v. HARPER, &c.

(Filed February 3, 1887.)

Fraud—In pari delicto—Although a conveyance was intended to defeat the law, a court of equity will set it aside at the instance of the grantor if a relation of trust and confidence existed between the grantor and grantee, and the grantor was induced to execute the conveyance through false alarms or fear of legal consequences excited by the grantee, the parties being in delicto, but not in pari delicto.

An aged mother, being induced by her son to believe that a suit for slander was about to be instituted against her which would result in the loss of all her property, conveyed to her son the bulk of her estate. The suit for slander was never brought, and there was no foundation whatever for the son's suggestion that it was about to be brought. The grantor by this action seeks to have the conveyance set aside. Held—That the relief should be granted.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Holt.

When the conveyances now in question were executed the appellant, Harriet Harper, was a widow and seventy-three years of age. She then had three living children, two of whom resided in distant States, while her son, the appellee, Charles Harper, who was then thirty-five years old, lived near her, and in whom at that time she appears to have had implicit confidence.

She was the owner of three houses and lots in the city of Louisville. On February 21, 1881, she had her vendor convey one of them, subject to a life estate in her, to Sallie Harper, the daughter of her son, Charles Harper, with the further condition that in the event of the granddaughter's death without lawful issue it should pass to a grandson, Arthur Harper, the son of Charles Harper.

On September 27, 1881, she conveyed the other two lots to Charles Harper in trust, to be conveyed by him to his two children, Sallie and Arthur, when they became of age; but if either died before that time then the survivor was to have them; or if both so died then they were to pass to Charles Harper. She retained no estate of any character in these two lots, or any interest in the revenue arising therefrom.

Upon the contrary the deed provided that the profits thereof were to go, first, to pay taxes, insurance and necessary repairs upon the property; second, for the support and education of the two children; and any residue remaining was to be invested until their majority for their benefit.

This left her with but little if any estate, save her life interest in the lot conveyed by the first named deed, and upon which there is a small house in which she is now residing. In fact she is now, in her old age, in destitute circumstances, while her son Charles and his family are living upon the rents arising from the property covered by the trust deed.

She asks that both deeds be set aside upon the ground that their execution was procured by false representations made to her by her son, Charles Harper. The petition also substantially states, but not in express words, that they were obtained by undue influence upon his part over her; and the answer makes this issue by expressly denying it. She avers that a considerable sum of money was stolen from her; that she accused a certain person of the offense upon information given to her by her son, the appellee Charles Harper; that he falsely and fraudulently represented to her, and induced her to believe, that the accused party was about to sue her for slander; that it would result in the loss of all her property and reduce her to poverty; and thus procured her to execute the deeds, ostensibly to protect her, but in fact to obtain the estate for himself. The testimony of the appellant supports this version of the transaction, but is in direct conflict with that of her son. The wife of the latter also contradicts the appellant to some extent, but of course the representations might have

been made without her knowledge. The attorney who prepared the trust deed testifies that it was done by the direction of the appellant, and that she understood it. But two other witnesses testify in the case. They are disinterested. The one says that he heard the appellant say that she intended to give her property to Charles Harper's children. The other testifies that the appellee, Charles Harper, told him that his mother had charged the party with the theft; that he was afraid she would be sued for it; that he wanted to fix her property so that in that event a judgment could not be collected, and that this was the object of the trust deed.

This is substantially all the testimony in the case. It appears, however, that the money was not lost until July 11, 1881; and the attack upon the deed of February 21, 1881, appears to have been abandoned during the progress of the case. In fact the appellant in her testimony does not seem to question it, nor is it now assailed in argument. No further notice will, therefore, be taken of it.

It is impossible to be entirely sure of the true state of case, owing to the contradictory character of the testimony. The probabilities must, therefore, be thrown into the scale. The surrounding circumstances must be considered. They favor her claim. It is difficult to suppose that the appellant would have deeded away nearly all of her property, reserving not even a life estate in it or any of the income arising from it, and leaving her without any means of support, unless there had been some motive or impelling power driving her from competency to poverty stronger than her affection for her grandchildren. It occurred, too, after the loss of her money. No cause sufficient in our opinion to account for it is even hinted at in this record, save the fear of a suit for slander and the possible consequent loss of her property.

There is no testimony in the case tending to show that this belief was created in her mind in any other way than through the talk of her son to her. If it existed, as we think it did, then its creation is unaccounted for save in this way. No suit

was ever brought, and it is not shown that the party ever intended to bring any. Indeed it was utterly unheard of, so far as this record discloses, save from the tongue of Charles Harper, but yet the old lady's mind was filled with this belief. In her imagination poverty in her old age stared her in the face. Grim want was at her door; and in this supposed emergency she had no one at hand to trust, or upon whose judgment she could rely, save that son in whom not only her confidence was reposed, but an undoubting faith that he would do right by his mother. It is urged, however, that if this be so yet she must be turned out of court because it was an effort to defeat the law to which she was a party. *Inter partes in pari delicto, potior est conditio defendentis.*

It is true that in cases of executed contracts, if the parties be in *pari delicto*, they will be left where they have placed themselves. They do not come into court with clean hands. If, however, one party is but an instrument in the hands of the other then they are not in *pari delicto*.

Judge Story says: "One party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offense." In such a case they are, perhaps, in *delicto*, but not in *pari delicto*. The act may indeed be substantially that of the one party.

Thus the law forbids the payment of usury, but if the borrower seeks equity for relief it will be afforded; or if he has paid it he may recover it back. The rule *particeps criminis* does not apply. He is not in *pari delicto*. He is the slave of the lender—is in *vinculis*, and must submit to his necessities.

A court of equity will interpose and set aside an instrument as between the parties to it, although it was intended to defeat the law, if the parties did not stand upon an equal footing, and if the one influenced and controlled the conduct of the other; and when a relation of trust and confidence exists the party in whom it is reposed, and who has obtained a benefit, should show an undoubted right to it.

The onus is upon him to make it appear that the transaction was fair and proper, and relief will not be denied to the one least in fault if he has been led into it in violation of confidence and by exciting false alarms or fear of legal consequences. If the mind of one of the participants in the transaction exercises an undue influence over that of the other, whether by imposition or threats upon the one side and confidence or weakness upon the other, equity will grant relief to the latter. Even if the party had sufficient capacity to contract, yet if through trusting confidence the other had led him into the illegal act and then imposed upon him, such relief will not be refused.

In *Osborne v. Williams*, 18 Ves., 382, a father and son entered into a contract in violation of a statute. It had been executed by the son and the father had derived a benefit therefrom. Both parties having died the representatives of the son sued those of the father for an account and relief was granted upon the ground that while the parties were in delicto yet they were not in *pari delicto*.

In *Prickston v. Brown*, 3 Jones, Eq., 494, a mother, upon the advice of her son, executed a deed of trust for the payment of her debts, but which left out one of her creditors and secured several fictitious notes executed to the son, in whom she had implicit confidence. She having paid all of the bona fide indebtedness the deed of trust was vacated at her instance, the court saying that "the mother and son were in delicto, but not in *pari delicto*."

See also the cases of *Boyd v. De la Montaigne*, 73 N. Y., 498; *Barnes v. Brown*, 32 Mich., 146; *O'Connor v. Ward*, 60 Miss., 1,025; *Freelove v. Cole*, 41 Barb., 318; and *Anderson v. Meredith*, 82 Ky., 364, where it is held that if the mind of one of the actors in a fraud exercises an undue dominion over that of the other, by reason either of physical or intellectual weakness, or from a confidence admitting of imposition, then the general rule that equity will not aid either party to it does not apply.

In the case now presented the parties did not stand upon an equal footing. They were not dealing at arms' length. The

son had the confidence of his widowed mother. Such a relation existed as gave him special power over her, but the filial love due to her seems to have cringed to self interest, and he is found practicing on the weakness and confidence of his aged mother. She was not in debt; no creditor was to be defrauded; and under the circumstances the deed must be regarded as the creature of the false alarm of legal consequences in her mind, but of which he was the author, and is, therefore, his act, rather than that of the mother.

Judgment reversed, with directions to render a judgment annulling the deed of September 27, 1881, and directing a reconveyance to the appellant of the property described in it, and for further proceedings in harmony with this opinion.

F. T. Fox, jr., for appellant.

J. T. O'Neal and W. L. Jackson, jr., for appellees.

GREENHILL v. BIGGS, &c.

(Filed February 8, 1887.)

Adverse possession—Joint tenants—While it is a general rule that the entry of one tenant in common will inure to the benefit of all, one tenant in common may so enter and hold as to render the entry and possession adverse, and amount to an ouster of a cotenant; nor is it necessary to bar a recovery that the cotenant should have notice that the possession is claimed to be adverse to him, it being sufficient when one joint owner holds and claims the land continuously for the statutory period, and in such manner as to apprise the other joint owners of the adverse character of the possession.

Appeal from Carter Circuit Court.

Opinion of the court by Judge Lewis.

About the year 1840 Hiram Biggs purchased of one Rice, the patentee, the land in controversy, receiving a bond for title, but, without taking actual possession, removed to the State of Ohio, where he died about 1841 or 1842. And some time thereafter his widow and eight children removed on the land, erecting a house and occupying it until 1848, when the title bond

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given by Rice was assigned, or attempted to be assigned, by the widow and three of the children to ——— Thompson, who thereupon took possession.

Thompson sold the land soon after his purchase to Pennington, and he to Dickerson, who held possession until 1861 or 1862, when he sold it to Ross, who held and claimed all the land as his own until 1869, when he sold and conveyed it to appellant, Greenhill, who has held and claimed it ever since.

This action was brought May 9, 1881, by the seven heirs at law of Hiram Biggs, one of them having died, to recover the entire tract. But the court rendered judgment for only four-sevenths, dismissing the petition as to the three children who, with their mother, executed the assignment of the title bond to Thompson in 1848.

There is filed as an exhibit of the amended petition a copy of the record, or part of the record, of an action by Thompson against Rice and the widow and children of Hiram Biggs, instituted in 1854, in which he filed the title bond mentioned, and asked for a conveyance to him by Rice of three-eighths, intended to be three-sevenths, of the land in virtue of the sale and transfer to him by the widow and three children in 1848, and judgment was, in 1859, in that action, rendered accordingly. But whether a deed was made to him or to the other four children of Hiram Biggs, in pursuance of the judgment, does not appear. But in 1865 he made an absolute deed for the whole land in severalty to Ross, who was then in possession, as he has been since 1862, when he purchased from Dickerson.

At the date of the assignment of the bond in 1848 none of the children were of full age, and it of course might thereafter have been avoided by the three children. But all were of the age of twenty-one years in 1865, when the deed was made by Thompson to Ross.

The ground upon which the lower court decided the statute of limitation constituted no bar to recovery by the four children not parties to the assignment in 1848, and rendered judgment in their favor for four-sevenths of the land, is that

Thompson and his vendees entered and held as tenants in common with them.

There can be no question of the correctness and frequent application by this court of the general rule that the entry of one tenant in common will enure to the benefit of all. But in regard to it this court, in the case of *Gill & Simpson v. Fauntelroy's heirs*, 8 B. M., 177, said: "This proposition is based upon the supposition that the entry is made either *eo nomine* as tenants in common, or that it is silently made, without any particular avowal in regard to it, or without notice to a co-tenant that it was adverse. An entry of the latter character would not be presumed adverse. So also possession by one tenant in common as such will be the possession of the co-tenants also, and in the absence of proof to the contrary the presumption would be that the possession was so held. But the doctrine has been long since held, and the authorities already cited sustain it, that one tenant in common may so enter and hold as to render the entry and possession adverse, and amount to an ouster of a co-tenant."

We do not think the thirty years' statute can avail appellant in this case. For although more than that period of time elapsed, from 1848 to the commencement of this action in 1881, there is not sufficient evidence to show that Thompson, or any of his vendees, previous to 1865, purchased, claimed or held the whole land in severalty. On the contrary Thompson, in the action instituted by him in 1854, presumably for the benefit of his vendees, claimed only an undivided interest of three-sevenths, and recognized the title of appellees to the remaining four-sevenths. Consequently the cause of action did not accrue to appellees until after that time.

But from 1865 Ross and appellant, his immediate vendee, held and claimed under the deed of that date, which conveyed title to the whole land, and their possession, having been actual, open and continuous, amounted to a denial of the title of appellees to any part of it.

It is true it does not satisfactorily appear that appellees had

actual notice fifteen years before the commencement of this action that the possession was claimed to be adverse to them. But actual notice has never been held by this court to be necessary in order to constitute adverse holding a bar to recovery in such case, it being deemed sufficient where one joint owner holds and claims the land continuously, and in such manner as to apprise the other joint owners of the adverse character of the possession. (Russell's heirs v. Mark's heirs, 3 Met., 87.)

In Farrow v. Farrow, 4 B. M., 605, decided in 1844, it was held that in analogy to the rules applicable to landlord and tenant an agent might place himself in a hostile attitude to his principal, and by openly and publicly claiming and treating the land as his own, alienating portions of it and delivering the possession, and continuing such acts for more than twenty years, justify a presumption of notice from the time he thus placed himself in an attitude of hostility to the title of his principal.

In Riggs v. Dooley, 7 B. M., 235, it was held that as soon as the purchaser of one tenant in common set up claim, in his own right, to the whole tract, and claimed to hold against all the heirs, his possession was adverse, and the statute commenced running against the two heirs who had been tenants in common with him as soon as they had notice of the adversary holding; and after a lapse of twenty years' continued assertion of right notice from the commencement of the adverse holding might be presumed. And it was so expressly held in Russell's heirs v. Mark's heirs, just referred to; Gill & Simpson v. Fauntelroy's heirs, 8 B. M., 436; and Larman v. Henry's heirs, 13 B. M., 436.

In this case the evidence is conclusive that from 1865 Ross and appellant held and claimed the land adverse to the title of appellees openly and continuously, and in such manner as to apprise them, for more than fifteen years before the commencement of the action, and according to the well settled doctrine of this court and the policy of the law they must be presumed to have had notice thereof from the commencement

of the adverse possession. Consequently the statute of limitation is a bar to any recovery, and the judgment must be reversed and cause remanded, with directions to dismiss the petition of appellees.

Wm. Bowling for appellant.

J. D. Jones, R. D. Davis and E. F. Dulin for appellees.

GROSS, &c. v. EDDINGER, &c.

SAME v. CONRAD, SURVIVING PARTNER, &c.

(Filed February 5, 1887.)

Fraudulent conveyances—Husband and wife—A debtor transferred his business to his wife, who was totally unfit for the business, and had no means of her own with which to carry it on, a decree of court empowering her to trade as a feme sole being first obtained. Thereafter the business was carried on by the husband as "agent" for the wife. The business was finally sold, and with the proceeds a lot was purchased and improved, the conveyance being made to the wife. This is an action by the husband's creditors to set aside that conveyance as fraudulent. Held—That the relief was properly granted.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Lewis.

Appellees instituted their respective actions in the Louisville Chancery Court for the purpose of setting aside a conveyance of a house and lot to appellant, M. E. Gross, the wife, and subjecting it to the satisfaction of their debts against Geo. S. Gross, the husband. And the two cases being tried together judgment was rendered in favor of each of the plaintiffs for a sale of the property as prayed for in their petitions.

The action of appellees, Eddinger & Bro., was upon a judgment rendered in their favor against Geo. S. Gross, in October, 1880, for \$216.83, and interest from that date, upon which an execution was duly issued and returned by the proper officer with an endorsement thereon no property found.

The action of appellees, Plaffenger & Co., now standing in the name of Conrad, surviving partner, was upon an open ac-

count against him, extending from March, 1879, to March, 1880, the balance claimed being \$188.16

In the first named action it is stated that subsequent to the issuing and return of the execution mentioned Geo. S. Gross purchased the property, and in order to cheat, hinder and delay his creditors fraudulently caused the deed therefor, of date September, 1883, to be made to his wife, M. E. Gross, notwithstanding he is the real owner of, and paid for, the property and improvements thereon.

In the other action substantially the same allegation of fraud is made, and an attachment was asked, issued and levied on the house and lot.

It appears from the evidence that in 1879 Geo. S. Gross was the owner of a coffee house, on Water street, in the city of Louisville. But in October, 1880, a license to carry on a tavern, with the privilege to retail liquor at the corner of 12th and Main streets for one year from July, 1880, was issued to "Geo. Gross, agent."

In July, 1881, by judgment of court, M. E. Gross was empowered to act as a feme sole as provided by statute, and on the 23d of that month a license was issued to her to keep a tavern at the same place for one year, the bond required in such cases being signed "M. E. Gross, by Geo. Gross, agent." From that place they removed to Market, between 3d and 4th streets, where the same business was continued in her name about four months, when the business and property were sold, according to the deposition of Geo. Gross, for a profit of \$1,000, and with that and the profits on the sales of the bar, the lot was purchased and the improvements put on it, the whole costing about \$2,000. In addition there was enough to recommence the same business at another stand on Market street, where they now are.

M. E. Gross had no means of her own at the time the business was commenced at the corner of 12th and Main, except such as may have been given to her by her husband, which was very little, if anything.

There is no satisfactory reason given by either of them for the sudden transfer of the ownership of what little capital he may have had to her, and the assumption by him of the position of agent instead of principal in the business. She is not shown to be at all qualified or adapted for the business of retailing liquors, nor does she appear to have had any discretion, or to have given any attention to the management of it. Though asked to state, she could not tell from whom the bar room at 12th and Main streets was purchased or leased, nor how much was paid or agreed to be paid for it. She does not state how much money she had of her own when they went to that place, nor that she had any except that given by her husband. She bought no supplies, made no sales, handled none of the money; but admits in her deposition that her time was taken up in attending to household duties and caring for her children.

She did not handle or control the \$1,800 for which the business on Market, between 4th and 5th streets, was sold, being ignorant of the bank it was deposited in. She does not appear to have had anything to do with the negotiation for the lot in question, nor could she, in her deposition, state how much was paid for it or for the improvement put on it.

The entire management and control of the business, now claimed to belong to the wife, were left to the husband, without question or knowledge on her part of the manner in which he was carrying it on. And the only explanation he undertakes to give for this extraordinary abandonment by him of the ownership of the business and transfer to his wife, who was totally unfit for it, and without means of her own to carry it on, is that for a short time he had rheumatism, how long does not appear. Though by his skill and industry alone, for she contributed nothing, enough was realized out of the business in about two years after she was invested with the rights of a feme sole to buy and improve the lot at a cost of about \$2,000, besides furnishing stock for the new stand on Market, between First and Second streets; he claimed neither compensation nor share in the profits, but when asked what he was to

receive for his services said: "I got all I wanted to eat, clothes to wear and a good bed to sleep on."

It seems to us that as this record stands it would be contrary to common experience and common sense to attribute the conduct of the husband and wife to any other purpose than a fraudulent device to cheat, hinder and delay his creditors; and as the condition of the parties was not such as authorized the judgment making her a feme sole, in the meaning of the statute, it is a reasonable supposition it was sought by them in order to further his fraudulent purpose.

As, therefore, the transfer by him to her of his capital and business was fraudulent as to his creditors, the lot in question purchased with the proceeds is liable to the debts of appellees, which existed when the transfer was made, for she contributed neither capital, labor nor skill in the purchase of the lot.

Wherefore the judgment in both cases is affirmed.

M. & D. A. Sachs for appellant.

Lane & Burnett for appellees.

SHELBURN V. COMMONWEALTH.

(Filed Feb. 8, 1887.)

Embezzlement—A clerk, business manager or other agent is not guilty of embezzlement where money converted by him to his own use was collected by him for his principal, by the principal's authority.

Appellant, having been employed by the officers and members of a church for the purpose of soliciting and collecting contributions to be used in paying for certain work done on the church building, converted to his own use \$7 paid to him for that purpose. Under an indictment for embezzlement charging these facts he was convicted. Held—That appellant acted in soliciting and collecting solely on behalf of the church as its agent, and not on behalf of the subscribers, and a payment to him was a payment to the church. Therefore, he is not criminally liable under the statute for embezzlement.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Bennett.

The indictment under which the appellant was tried and

convicted of the crime of embezzlement charges in substance that appellant was employed for and by the officers and members of the colored Baptist Church, at Taylorsville, Kentucky, for the purpose of soliciting and collecting sums of money to be contributed by divers persons for the purpose of paying for the plastering of the said church; that the appellant, as such soliciting and collecting agent and employe, did collect sums of money, aggregating \$7, from various persons who contributed the same for said purpose, and which was to be paid over by appellant to the officers and members of said church; that appellant failed and refused to pay over the money thus collected to the officers and members of the church, but fraudulently converted the same to his own use.

Section 2, article 12, chapter 29 of the General Statutes, provides in substance, first, that if any carrier, porter or other person to whom money or other property or thing which may be the subject of larceny may be delivered, to be carried for hire, shall embezzle or fraudulently convert to his own use, or secrete, with intent to do so, any such property, either in mass or otherwise, before delivery thereof, at the place or to the person to whom the same were to be delivered, shall be confined in the penitentiary not less than one nor more than five years; or, second, if any other person who may be intrusted with money, or other property or thing which may be the subject of larceny, to be delivered to another person, or at a particular place for the purpose of being delivered to another person, shall embezzle or fraudulently convert to his own use such property or any part of it, or secrete it with intent so to do before delivery thereof to the person to whom it was delivered, or at the place it was to be delivered for the purpose of delivery to another person, shall be confined in the penitentiary not less than one nor more than five years.

The first part of the statute relates to carriers, porters or other persons who undertake, for hire, to carry and deliver money or other property or thing, which may be the subject of larceny, from one person to another, or at some place to be

delivered to another person. The latter part of the statute relates to any other person who may be intrusted with money or other property or thing, which may be the subject of larceny, by a person to be delivered to another person, or at some place to be delivered to another person. The person entrusting the money or property to the other, to be delivered by that person, must have some interest in its delivery as agreed. This view of the statute is sustained by the case of *Barclay v. Breckinridge, &c.*, 4 Met., 378; also the case of *the Commonwealth v. Ball*, MS. opinion delivered in 1884.

It was certainly not intended by the framers of the statute to make the clerk, business manager or agent authorized to collect money for his principal or employer guilty of embezzlement because of his conversion to his own use of money collected by him by the authority of his principal or employer.

The appellant, as is charged in the indictment and as the proof clearly shows, was employed by the officers and members of the church to solicit and collect contributions from well-disposed persons for the purpose of raising funds with which to plaster the church. As soon as these contributions were collected they became the property of the officers and members of the church, and the contributors parted with their title to them and interest in them. The payment of the contributions to the appellant as the agent of the church was a payment to the church, and the church had no further claim upon the contributors. If the agent failed to pay over the contributions the loss fell upon the church and not the contributors. Therefore, it can not be said that appellant was soliciting and collecting on behalf of the subscribers to the fund. He did not undertake to receive the subscriptions from the subscribers and deliver them to the officers of the church on behalf of the subscribers, but acted in soliciting and collecting solely on behalf of the church as its agent. In this he stood precisely in the same light as any private clerk or business manager collecting for his principal by the principal's authority. Therefore, his wrongful con-

version of the money collected did not make him criminally liable under the statute for embezzlement.

The case is reversed, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

J. G. Offutt for appellant.

P. W. Hardin for appellee.

BULLOCK V. FALMOUTH & CHIPMAN HALL TURN-
PIKE ROAD COMPANY.

(Filed February 15, 1887.)

1. Subscription to turnpike company—Appellant agreed verbally to subscribe to the capital stock of a turnpike road company, the money to be paid when the company was organized and the work begun, and to be used in the construction of the road. Upon the faith of his agreement the company has been organized, others have subscribed and the construction of the road has been begun. Each subscriber, when he paid, was to have a property right in the road to the extent of his subscription, and was to receive his proportion of profits arising from the earnings of the road.

Held—That it is now too late for appellant to withdraw from the enterprise as to do so would be a fraud upon the rights of his associates. And the subscription not being a mere voluntary donation, it was not necessary that the agreement should be in writing to be binding.

2. Same—Where a company is authorized to issue its capital stock and put it upon the market for sale, and a person agrees with the company to purchase so much of the stock at an agreed price, merely as an investment, the company can not recover the agreed price without having delivered or tendered the stock to the purchaser. In such a case the company's remedy is confined to an action for the recovery of such damages as it may have sustained. That rule, however, does not apply to a case like this. The case of *Mt. Sterling R. R. Co. v. Little*, 14 Bush, 431, is, therefore, overruled in so far as such a rule is allied to the facts of that case.

3. Statute of frauds—A contract which may be performed within a year from the making of it is not within the statute of frauds.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Bennett.

The appellant and others believing that the construction of a turnpike road from Falmouth to Chipman Hall, in Pendle-

ton county, would be beneficial to their private interest, as well as that of the public, agreed to incorporate themselves, under chapter 56 of the General Statutes, into a company for the purpose of constructing the road. Pursuant to this agreement articles of incorporation were drawn up and signed and acknowledged by appellant and others. The company was organized thereunder as "The Falmouth & Chipman Hall Turnpike Road Company," and within a short time thereafter commenced constructing the road.

The means necessary for the construction of the road were to be furnished by subscriptions to its capital stock. Many persons did subscribe to the capital stock by signing their names, together with the amount they wished to subscribe, to a subscription paper.

The appellant, prior to the incorporation of the company, agreed, verbally, to subscribe \$1,000 to the capital stock of the company, for the purpose of constructing the road, the sum to be paid as soon as the company was organized and the construction of the road commenced.

After the company was incorporated and organized the appellant often recognized his liability to pay the \$1,000 as soon as the work of constructing the road was begun; and after the work of constructing the road was begun he promised to pay the \$1,000.

But afterwards, when the construction of the road had been pushed nearly to completion, the appellant, for the first time, refused to pay the \$1,000; thereupon the appellee brought suit in the Pendleton Circuit Court against the appellant for its recovery. The trial of the case resulted in a verdict by the jury in favor of the appellee for the whole amount claimed. The lower court overruled appellant's motion for a new trial, and rendered judgment against him, upon the verdict of the jury, for the amount claimed. He has appealed to this court.

The case of the Twin Creek and Colemansville Turnpike

Road Company v. Lancaster, 79 Ky., 552, was upon the following state of facts:

"We, the undersigned, for the purpose of constructing a turnpike road from ——— to ———, promise and agree to subscribe the amount set opposite our respective names to the capital stock of a company to be organized for the purpose, and to pay the same in such installments as may be called for by the proper officers of such company; and we further agree that our said subscriptions may be subject to a call of ten per cent. as soon as such a company or corporation is completed or organized."

This court held in that case that the association formed under the General Statutes was nothing more than a private corporation.

And, although the improvement contemplated was for the public good, yet the profits arising from the use of the road inured to the benefit of the stockholders; and the contract or subscription, entered into prior to the organization of the company, created such an obligation as rendered the subscribers liable for their subscription.

The court also said: "The purpose of signing this subscription was to enable the subscribers to organize and form a corporation that would inure to the benefit of all. It was in fact a mutual agreement, by which each subscriber pledged himself to the other to pay a certain sum of money, in order to perfect the organization and complete the enterprise."

A subscriber or partner in an intended undertaking, subscribing an agreement to take measures to carry out the same, can not discharge himself from liability or repudiate the concern to which he may have pledged himself.

This case is like that case in nearly every essential particular, except in this case the appellant's agreement to subscribe was verbal. In this case, as in that, the agreement to subscribe was not intended as a mere voluntary donation.

But the agreement to subscribe was intended to effect an organization for the purpose of building the road, and when

the organization was effected and the construction of the road commenced the money was to be paid and used in completing the road, which, when finished and opened to the use of the public, would advance the private interest of appellant and his associates as well as the interest of the public.

Now the company having been organized upon the faith of appellant's agreement to subscribe \$1,000 to the capital stock, and others having subscribed to the stock upon the faith of that agreement, and the work of constructing the road having been commenced upon the faith of that agreement, it is too late for the appellant to withdraw from the agreement. To do so would be a fraud upon the rights of his associates who embarked in the enterprise and put their money therein upon the faith of his promise.

Also, under the circumstances of this case, the appellant's agreement being verbal makes no difference; he is bound by it as much as if the agreement had been in writing, because the agreement to pay \$1,000 was not intended as a mere voluntary donation, but was an agreement to pay \$1,000, to be used in the construction of the road, when the company should be organized and the work thereon commenced. He was, upon this payment, to have, in common with his associates, a property right in the road to the extent of \$1,000, and receive his proportion of profits arising from the earnings of the road. So the consideration for the agreement was valuable, and there being nothing in the statute of frauds requiring such an agreement to be in writing, it is as binding upon him as if it had been in writing.

Also the contention that the agreement comes within the provision of the statute of frauds, which requires contracts not to be performed within a year from the making of them to be in writing, is not well taken, for the reason that the statute refers to such contracts as are not to be performed within a year from the making of them, and not to such contracts as may be performed within a year from the making of them. Here the organization of the appellee's company and the begin-

ning of the construction of the road could be performed within a year from the time of appellant's agreement.

Where a company is authorized to issue its capital stock and put upon the market for sale, and a person wishing to purchase the stock, as stock, merely as a judicious investment, agrees with the company to purchase so much of the stock at an agreed price, and the company, without having delivered the stock or tendered it to the purchaser, sues for the recovery of the agreed price, then the rule is that the company can not maintain such an action because the company still holds the property; and the law will not permit it to withhold the property from the purchaser and recover the agreed price of it.

In such a case the company's remedy would be confined to an action for the recovery of such damages as it might have sustained, such as the loss of a bargain, by reason of the purchaser's failure to comply with his contract.

This rule was correctly stated in the case of the Mt. Sterling Railroad Company v. Little, 14 Bush, 431, but the rule, by inadvertance, was incorrectly applied to the state of facts before the court. The same rule announced in the case of the Twin Creek & Colemansville Turnpike Road Co. v. Lancaster, above, and approved in this case, should have been applied to the facts of that case. And to the extent that the opinion in that case was made to apply to the facts of it, it is overruled. The instructions given by the lower court to the jury correctly stated the law of the case.

The verdict of the jury was in accordance with the weight of evidence in the case.

The judgment of the lower court is affirmed.

C. H. Lee, G. R. McKee, J. T. Simon and O'Hara & Bryan for appellant.

Leslie T. Applegate for appellee.

LOUISVILLE & NASHVILLE R. R. CO. V. COMMON-
WEALTH. (Four Cases.)

Appeals from Lincoln Circuit Court.

SAME V. SAME.

Appeal from Warren Circuit Court.

SAME V. SAME.

Appeal from Marion Circuit Court.

(Filed February 17, 1887.)

1. Taxation of railroads—Since the enactment of the law of March 17, 1876, "to make taxation equal and uniform," there can be no question as to the liability of railroads for county taxes.

2. Same—The provisions of article 5, chapter 92 of the General Statutes, as to proceedings against taxpayers who have failed to list their property with the assessor, are applicable to railroads.

3. Same—While the act of April 3, 1878, prescribing the mode of taxing the property of railroad companies, expressly repealed all existing laws as to the assessment and taxation of such property, it did not take away the existing mode of procedure as to unassessed taxes of a prior date, but to that extent left the existing statutes in force. Therefore, those statutes govern these proceedings to compel the assessment of appellant's property for county taxation for the years 1876 and 1877.

4. Compulsory assessment—Article 5, chapter 92 of the General Statutes provides for the compulsory assessment of property, and not merely for a penalty for the failure to list.

5. Failure to list property—A summons based upon section 20 of that article should, in general terms, describe the offense, stating whether it be for giving a false or fraudulent list, or a refusal of the person to state what he is worth, or a failure or refusal upon demand to give in any list whatever; but a summons based upon section 25 need not charge anything more than a mere failure to list.

6. Same—If the default is not willful, or if, for any reason, the penalty can not be imposed, although the default be willful, as if barred by limitation, the court should direct the clerk to take the list.

7. Limitation—The right to coerce an assessment of property for taxation is not barred by limitation. No cause of action arises until the assessment is made.

8. The sheriff in reporting delinquents is not confined to those thus offending during his term of office.

9. Limitation—The court is of the opinion that the statute, in so far as it authorizes a judgment for a triple tax and fine against a delinquent, is penal in its nature, but it is not necessary to decide whether the one or five

years' limitation statute applies, as in either case the recovery of the triple tax and fine is barred in these cases.

Opinion of the court by Judge Holt.

These cases involve like questions, and will, therefore, be considered together.

To this end a brief history of them is necessary. The Warren and Marion county cases are proceedings to compel the appellant, the Louisville & Nashville Railroad Company, to list its property in those counties for the years 1876 and 1877 for county taxation; while in the Lincoln county cases it is sought to enforce a triple tax and fine against the appellant for its failure to list its property for those years for such purpose.

In the Marion county case the sheriff reported, in writing to the county court clerk, that the appellant had failed to give in a correct list; while in the other cases he reported that it had failed to list its property altogether.

In the Warren and Marion county cases a summons was thereupon issued against the appellant to show cause, if any it had, why its property should not be listed; and the matter having been heard by the county court, it directed its clerk to list the property, but rendered no judgment for triple tax or any fine. In the Marion county case this judgment was, upon appeal to the circuit court, sustained. In the Warren county case the appeal from the judgment of the county court was, after the introduction of testimony and upon hearing by the circuit court, dismissed.

It is urged that this action by the latter court must be reversed because, as the case, upon appeal, had to be tried *de novo*, the appellant had a right to its decision upon the questions at issue; and a dismissal of the appeal left the county court judgment in full force. It was, however, a virtual affirmance of it; and, although the proceedings was for the most part styled in the name of the Warren County Court, yet, as required by the statute, the summons was in the name of the Commonwealth.

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The summons in each of the Lincoln county cases required the appellant to show cause why a judgment for a triple tax and a fine of not exceeding \$100 should not be rendered against it for failing to list its property. The county court rendered a judgment in each case for the triple tax and a fine of \$100. The circuit court upon appeal reversed the judgments, and remanded the cases to the county court, with directions to it to render judgments requiring the appellant to list its property; and if it thereupon failed to do so, then to render judgment for the triple tax and fine. The appellant has appealed to this court from the action of the circuit court because it so remanded the cases. Upon their return to the county court it required the appellant to list its property; and it failing to do so, the court then rendered judgment for the triple tax and fine. Upon appeal they were affirmed by the circuit court, and the appellant has also appealed from these judgments.

Since the enactment of the law of March 17, 1876 (volume 1, Acts of 1876, page 78), entitled "An act to make taxation equal and uniform in counties where an ad valorem tax is levied by the county court," there can be no question as to the liability of railroads for county taxes. There is no reason why they should be exempt from this common burden. They enjoy the protection of the county government, the county thus furnishing the consideration for the taxation. They receive the benefit, and in return the duty of aiding in the support of the local authority is created. If they escape, others must bear more than their just proportion of the burden.

The act *supra* contains no provision, however, for an assessment of the property of a railroad through the county court. Under it only the assessor can make it; and no authority exists for these proceedings unless it be found in article 5, chapter 92 of the General Statutes. It provides:

"Sec. 20. If any person fail or refuse to give a list of his taxable property, when legally called upon for that purpose by the assessor or his assistant, or give a false or fraudulent

list, or refuse to give the amount he is worth, as required by the first article of this chapter, he shall be fined not exceeding \$100 and be subjected to the payment of three times the amount of the tax upon the estate by the county court.

“Sec. 21. The assessor, at the time he returns his tax book, shall also return the names of all delinquents described in the preceding section, and shall, as to fraudulent delinquents, state in what the falsehood or fraud consists.

“Sec. 22. The county clerk shall issue a summons, in the name of the Commonwealth, in which shall be stated the offense, in general terms, against each of the delinquents, returning to the next term of the county court, which shall hear and determine the case, upon giving to the defendant the right to have a jury to try the facts, if demanded before the trial is begun, which jury shall be composed of housekeepers, and summoned by the sheriff. If the defendant be found guilty the court shall enter judgment for the fine and triple tax and costs. The court shall fix the value of the taxable property upon which to impose the triple tax from their own knowledge, upon the statement of the defendant made upon oath, or upon such other evidence as it may be enabled to obtain, and execution shall issue for the fine, triple tax and costs. The fine and tax shall be certified by the clerk to the auditor, and accounted for by the sheriff as other public moneys.

“Sec. 23. The county court, before a judgment is rendered against a delinquent, may, if it is satisfied that the defendant was not willfully in fault, direct its clerk to take the list of taxable property of such delinquent in the manner prescribed by law. The lists aforesaid shall forthwith be certified to the sheriff and auditor, to be charged to the sheriff, and accounted for by him as other revenue. In such cases the county court may excuse the delinquent from the payment of the fine and triple tax upon payment of the costs of prosecution.

“Sec. 24. It shall be the duty of the county attorney to pros-

ecute under the preceding section 22, and, if he does so, shall be allowed thirty per cent. of the fine for his services.

“Sec. 25. When it shall be known to the sheriff that any person has failed to give in a list of his taxable property in any year when it shall be liable to taxation, he shall report such person to the county clerk, to be dealt with, fined and taxed as delinquents reported by the assessor. No sheriff or assessor shall be liable to cost in proceedings against delinquents reported by them.

“Sec. 26. Any person who has failed to give in his list of taxable property because he was not called upon by the assessor, may, after the assessor has returned his tax book, list the same with the county clerk at any time before the first day of October, who, on taking the same, shall be governed by the law regulating the duty of the assessor.”

It was held in the case of *Lincoln County Court v. L. & N. R. R. Co.*, 3 Ky. Law Rep., 436, that the above provisions of the statute were applicable to railroads.

The legislature, by an act approved April 3, 1878, entitled “An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation and for taxing same,” changed the mode of assessing the property of railroads. It, by its terms, repealed all existing laws as to the assessment and taxation of such property, and at the date of this enactment the taxes now in question had never been assessed.

It is, therefore, now said that all mode of procedure as to unassessed taxes of a prior date was gone. It was held otherwise, however, in the case last cited; and it can not reasonably be supposed that the legislature so intended.

It is urged, however, that the provisions of the General Statutes above cited do not authorize a proceeding for a compulsory assessment, but only for a penalty for a failure to list; and that as the act of 1876 did not provide for it, there is a *casus omissus* in the law as to compelling assessments for the years now in question.

This position of the appellant, in connection with the fur—

ther one that any penalty for its failure to list its property in 1876 and 1877 is now barred by time, would tend largely to defeat equal taxation; and this can not be presumed to have been the legislative intention, and especially so in view of its declaration as embodied in the title of the act of 1876.

An assessor can not take a list after the expiration of the time fixed by the statute for the return of his books. If, therefore, he has, for any reason or in any way, omitted it, and if the county court can, under the statute, only fine a party, and not have his list taken, then, if time has barred the imposition of a fine, he goes free of the common burden unless he voluntarily chooses to shoulder his part of it.

Certainly the legislature did not intend that the public right should be lost by the neglect of the public agent, or that the performance of his duty to his government by the property owner should be left merely to his willingness or caprice. Let us see, however, if they have in fact so left it.

These proceedings are based upon the information given by the sheriff, and are authorized solely by section 25, *supra*, of the General Statutes. A distinction should be drawn between this provision and section 20, *ibid*. The latter provides for the imposition of a triple tax and fine when the person fails or refuses, upon demand of the assessor, to give in his list, or gives a false or fraudulent one, or refuses to tell what he is worth. A summons based upon it should, in general terms, describe the offense. It should state, as was held in *Evans v. Commonwealth*, 13 Bush, 269, whether it be for giving a false or fraudulent list, or a refusal of the person to state what he is worth, or a failure or refusal, upon demand, to give in any list whatever; and if these proceedings were founded upon this section the lower court should have sustained the motion, which was made in each case, to quash the summons. The offending under section 25 is, however, confined to a mere failure to list; and this is all, therefore, that a summons issued under it need charge.

There is satisfactory reason for this difference. In the one

case the assessor reports the character of the failure, thereby enabling the clerk, when he issues the summons, to specify it. In the other, the sheriff has not the same opportunity as the assessor to know this, and is, therefore, required to report merely a failure to list, and this is all that the clerk has upon which to act.

In such case, however, the statute provides that the delinquent is "to be dealt with, fined and taxed as delinquents reported by the assessor." If reported by him the delinquent is liable to a judgment for the triple tax and fine; or if, in the opinion of the court, the default be not willful, it may "direct its clerk to take the list of taxable property of such delinquent in the manner prescribed by law." If, for any reason, the triple tax and fine can not be imposed, although the delinquent may be in willful default, as if, for instance, limitation prevents it, then the action of the court should be the same as if it had found the party in default, but not willfully so. It should, in such a case, adjudge the costs against the delinquent; and as the right to correct an assessment is not affected or barred by lapse of time, and no cause of action arises until the assessment is made, it should direct its clerk to take the list. (L. & N. R. R. Co. v. Commonwealth, 1 Bush, 250; McAllister v. Same, 6 Bush, 581; Lincoln County Court v. L. & N. R. R. Co., supra.)

This was the course pursued in the Warren and Marion county cases.

The constitutionality of the law conferring upon our county courts the power to assess delinquents is now, by reason of judicial construction, beyond question.

The law of 1819 (M. & B., 1,373), as well as the provisions of the Revised Statutes of 1852, relating to tax delinquents, were, in substance, similar to those of the General Statutes above cited; and in the case of Pennington v. Woolfolk, &c., 79 Ky., 13, the court appears to have regarded them as sustaining the construction we have given to the present law.

The sheriff in reporting delinquents is not confined to those thus offending during his term of office. Section 26 of the

statutes above cited provides that he shall do so when it shall become known to him that any person has so failed "in any year." The reason for this is obvious. As the assessor can not report them after he has returned his assessment, it follows that if the sheriff were confined to those delinquent during his term of office that many would escape taxation altogether.

In the Lincoln county cases, however, more than five years had elapsed from the time when the appellant rendered itself liable for the triple tax and fine.

The General Statutes, section 23, article 1, chapter 29, provides:

"Prosecutions by the Commonwealth to recover a penalty for a violation of any penal statute or law, and an action or procedure at the instance of any person to recover any such penalty, shall be commenced within one year after the right to such penalty accrued, and not after, unless a different time is allowed by the law imposing the penalty."

Section 2, article 3, chapter 71: "An action upon a liability created by statute when no other time is fixed by the statute creating the liability; an action for a penalty or forfeiture when no time is fixed by the statute or law prescribing the same * * * shall be commenced within five years next after the cause of action accrued."

We think the statute, so far as it authorizes a judgment for a triple tax and fine against a delinquent, is penal in its nature. The wording of the law so implies. The summons issues in the name of the Commonwealth; the statute says that "the offense" must be stated in it in general terms; if the delinquent is found "guilty" judgment is to be rendered against him; the county attorney is required "to prosecute;" and if he does so is allowed thirty per cent. of the fine for his services. (*Chiles v. Commonwealth*, 4 J. J. M., 578; *Evans v. Commonwealth*, 13 Bush, 269.)

It is unnecessary to decide, however, whether the cases fall within the one or the five year limitation statute because in either case a recovery of the triple tax and fine is barred by the lapse of time.

The judgment in the Marion and Warren county cases are affirmed, but those in the Lincoln county cases are reversed for further proceedings consistent with this opinion.

Rountree & Lisle, Wm. Lindsay, Hill & Alcorn, Mitchell & DuBose, H. W. Bruce and Porter & Porter for appellant.

W. H. Julian and J. C. Sims for appellee in Warren county case; Spaulding & Thompson and A. Duvall for appellee in Marion county case; Carpenter & Miller for appellee in Lincoln county cases.

BEADLES, WOOD & CO. v. McELRATH & CO.

Appeal from Graves Circuit Court.

SAME v. LEET & MEADOWS.

Appeal from Caldwell Circuit Court.

(Filed February 19, 1887.)

1. Illegal contracts—"Futures"—A contract is in form a contract for the sale and future delivery of personal property, but which is entered into for the sole purpose of speculating in "futures," and with no intention to deliver the property purchased, the intention being that the seller shall pay the difference between the contract price of the property and its market price on the day stipulated for its delivery, is a mere wager, and can not be enforced by either party to it.

2. Same—Such a contract, when unexplained, will be presumed to be valid, but when assailed by a proper pleading as having been entered into to cover up the real intention of the parties, by making that appear legitimate which is really a gaming transaction, parol proof is admissible to establish the defense, although the contract be in writing; and the real intention of the parties may be inferred from the circumstances.

Opinion of the court by Chief Justice Pryor.

These two cases were argued, and will be considered, as one case.

The appellants, Beadles, Wood & Co., were cotton brokers engaged in buying and selling cotton on commission, as the allege, in the city of New Orleans. They instituted the actions in the court below against the appellees for large sums

of money, said to have been advanced by them for the appellees in the purchase and sale of cotton on the cotton exchange in the city of New Orleans.

The appellees, by way of defense, allege, in substance, that the claim set up by the appellants originated by reason of certain transactions between them and appellants in the purchase and sale of cotton on speculation, and under contracts that were not to be performed, for the delivery of the cotton and the payment therefor at the maturity of the contracts; that they were dealing in futures, by which they were to pay in money the differences, by reason of wagering bargains, by which no cotton was sold or delivered, and none intended to be delivered, when the contracts were executed. They also allege that Beadles, Wood & Co. were dealing largely in cotton on their own account or for others, and that having made contracts, in which the appellees had no interest, similar to those made with the appellees, they were unable to meet their obligations with members of the cotton exchange with whom they contracted, and under the rules of the exchange those contracts were all declared forfeited, including the contracts said to have been made for the appellees; that the forfeiture took place before their contracts matured, and in that manner they were deprived of any right to recover, without fault on their part, of either the appellants or from those with whom they contracted for their benefit.

A jury, by special findings, determined the issue in the case of McElrath & Co., and the judge, on a submission of the law and facts to them, determined the case of Leet & Meadows.

The one case, that against McElrath & Co., was decided for the defendants because of its vicious consideration, it being a gambling transaction, and the other, that of Leet & Meadows, on the ground that the forfeiture of the contracts was caused by the insolvency of the appellants, who were unable to comply with their contracts, and caused the loss to the defendants, the judge further holding that the contracts was not a wagering contract or against public policy. The cases were

determined in different jurisdictions, but were heard together in this court. The judgment in each case was rendered for the appellees.

The appellants having denied that the contracts were invalid, relied on certain rules of the cotton exchange, from which it appears that such contracts can be enforced for the delivery of the cotton, and further established by the testimony that the contracts were made subject to the rules of the cotton exchange, and should not, therefore, be regarded as wagering contracts. The contracts being in writing, it is further maintained that parol proof is inadmissible to vary its terms.

From the rules of the cotton exchange the delivery of the cotton may be exacted, and the testimony conduces to show that the appellees entered into the contracts with the knowledge that, by its terms, those rules were to determine its legal effect; in fact the jury trying this case, in response to special interrogatories, have so said by their verdict.

In this case it then plainly appears that contracts, legitimate on their face, containing stipulations plain and easily understood, by which the cotton purchased is required to be delivered, have been declared vicious, in the one case at least, upon parol testimony showing that such was not the real purpose and intention of either party to the contract, the real purpose being in fact to speculate only in the rise and fall of prices, as has been determined by the special finding of the jury in the particular case.

If the written contract and the rules of the cotton exchange are to control the decision of this case, then the facts and circumstances by which the real nature of the various transactions were brought to light should have been excluded from the jury and a judgment rendered for the appellants, the plaintiffs below. The question simply is whether a contract, legal and proper in form, can be assailed by a proper pleading, and shown to be in fact a contract vicious in its character and contrary to public policy; a contract legal on its face, but when explained by the facts and circumstances connected with its performance is only a gambling transaction.

The rule is well established that parol evidence is not admissible to restrict, enlarge or contradict the terms of a written contract where there is no ambiguity in its meaning, but when facts are alleged showing the existence of fraud, or that the contract was entered into as a device to avoid what would otherwise be a vicious consideration, as is, in substance, alleged in this case, this rule has no application.

The rule, says Mr. Greenleaf, "is not infringed by the admission of parol evidence showing that the instrument is altogether void, or that it never had any legal existence, either by reason of fraud or for want of due execution and delivery, or for the illegality of the subject-matter." Again: "Parol evidence may be offered to show that the contract was made for the furtherance of objects forbidden by law, whether it be by statute or by an express rule of the common law, or by the general policy of the law," etc. (Greenleaf on Evidence, volume 1, pages 360, 361, 14th edition.)

So in this case, although by the rules of the cotton exchange the cotton was to be delivered, and the contract made with the appellees expressly stipulated the delivery at a particular day in the future, still if this was a mere device to avoid the effect of a contract that the parties really made, and if expressed in terms would have been vicious and without consideration, we perceive no reason why such facts may not be pleaded and proven, and the recovery on that account denied.

That a contract of sale may be made for the future delivery of produce, or any article of personal property, will not be controverted, and that such a contract, by the agreement of parties, or by the regulations connected with the boards of trade in the country, may be transferable from one to the other will be conceded, but when entered into for the sole purpose of speculating in futures, and with no intention to deliver the cotton purchased, but to pay the difference between the contract price of the cotton and its market price on the day, if a contract in good faith, the cotton was to be delivered, then the contract becomes a mere wager, and neither party to it can recover.

in his, the broker's, own name, and then on his books assigns, or, by contract, passes to each one of his eight customers 2,000 bales of cotton, at the price for which he purchased, the purchasers depositing such a margin as is required by the rules of the exchange. If the broker should receive a telegram from one of the parties in Kentucky to sell his 2,000 bales before the time of delivery, and one of his customers from Tennessee should want to purchase an additional 2,000 bales, he then transfers on his books the cotton of the Kentucky customer as sold to the Tennessee customer at that day's prices.

All dealers are to keep up their margins as the fluctuation in prices demand, as this is determined by the rules of the exchange. The speculator in futures, from this mode of dealing, whether for actual delivery or not, has in fact made a purchase of cotton, but can never ascertain with whom the contract was made. The broker may inform the exchange for whom he is purchasing, but this gives no right of action against any one but the broker. The broker is insisting that he is the mere agent of the purchaser, and entitled to his commission, and when told by the purchaser that the 2,000 bales of cotton must be delivered at the maturity of his contract, it is then ascertained that the broker has purchased 16,000 bales of cotton of one or more members of the exchange, in his own name, and the margin not being kept up, the entire contract is forfeited, and the money already advanced on the margin gone to the vendor of the cotton. In February, 1882, the appellants, being purchasers of near 60,000 bales of cotton, notified the exchange that they were unable to comply with their contracts. The forfeiture took place, and this was before the maturity of the contracts with these appellees, but it is now insisted that if the margins had been kept up the contracts would have remained in force. Suppose the margin had been forwarded to the appellants, from the testimony in this case, the appellants had purchased cotton exceeding in value more than \$200,000, and the margin being called for and not de-

posited, the whole contract went with the insolvency of the firm that took place in February, 1882.

These appellants were in fact selling to the appellees, and were not their agents. They purchased large quantities of cotton on the exchange on their individual account, and afterwards distributed those purchases between their customers, leaving them without any remedy, except against the broker, for the delivery of the cotton, if such had, in good faith, been the contract between them. With the price of cotton favoring the appellees, their claim as purchasers might have been enforced through their broker, in his name, but with an insolvent commission merchant, whose credit alone enabled him, in the first place, to enter the exchange and make these large purchases, the remedy was necessarily worthless, because the party in fact liable had become insolvent.

It is shown that within less than a year prior to their contracts with the appellees that appellants contracted for 300,000 bales of cotton, and on the 8th of February, 1882, the day they failed, the contracts they had on hand compelled them to receive and pay for nearly 60,000 bales of cotton, a portion of which they say was the cotton of these appellees.

The appellants were not worth exceeding \$75,000, if that much, and yet it is argued that such contracts were valid business transactions, and the parties expected to comply with the terms of each contract, or, if not, that the prime object was not to speculate merely in the rise and fall of cotton, but to receive or deliver the cotton purchased or sold. It is evident that if the margins had been forwarded by the appellees that all would have gone in the financial wreck that followed the reckless adventures of men who were doubtless enterprising merchants, but who had speculated to such an extent, either for themselves or others, as to involve all in financial ruin. This would constitute a complete defense to each action, regardless of the other questions raised, and the judgment in the case of Leet & Meadows was, therefore, proper.

It is claimed that McElrath, one of the firm, was in New

Orleans, and on the exchange when some of this cotton was purchased. He was not a member of the exchange, and, therefore, made no purchase, but the cotton was purchased in a manner, and as all other cotton was, for their customers by these appellants. They were simply paying the appellants a bonus for the privilege of trading with them, and were in fact the vendors and the appellees the vendees of the cotton.

These appellees were men of limited means living in this State, and contracting by telegrams and letters for futures in cotton, with no intention or expectation of receiving a single bale, either from the appellants or any one else, and this was the intention and purpose of the contracts—a fact known to the appellants as well as the appellees.

The testimony of the appellants leaves no doubt on this subject, and neither the rules of the cotton exchange nor the letter of the contract will be allowed to give validity to such agreements.

The opinion in the case of *Sawyer, Wallace & Co. v. Taggart*, 14 Bush, 727, was based on the idea that no evidence was offered by the defense showing that the contracts were to be settled by the payment of differences, but, on the contrary, the plaintiffs had assumed the burden, or rather established that the contracts were to be executed in good faith, with no evidence conflicting with such a conclusion.

Here the character of the business transactions conducted by the appellants from their own statements, both with the appellees and others, conduce to show that there was a tacit, if not an express, agreement that no cotton was to be delivered, and with the testimony for the defense there can be no doubt on the subject.

But it is argued that a mere tacit agreement, or one necessarily inferred from the circumstances surrounding the various transactions connected with the positive statements of the defendants, can not supplant that which the parties have reduced to writing, and the contracts must be enforced because

they purport to be valid contracts, and the rules of the cotton exchange have so determined. In discussing a similar question the Supreme Court, through Mr. Justice Matthews, said:

"We do not doubt that the question whether the transactions came within the definition of wagers is one that may be determined upon the circumstances, the jury drawing all proper inferences as to the real intent and meaning of the parties, for, as was properly said in the charge, it makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade. It might, therefore, be the case, that a series of transactions might present a succession of contracts perfectly valid in form, but which, on the face of the whole taken together, in connection with all the attendant circumstances, might disclose indubitable evidence that they were wagers." (Irwin v. Miller, 110 U. S. Reps., 511.)

The bulk of the transactions in the exchange by the appellants were in the department known as the margin, as distinguished from the other departments. The amount of cotton delivered in all the sales and purchases did not exceed 4,000 bales, and the proof conduces to show that this cotton was on consignment, but whether so or not, it is unreasonable to suppose that these appellees, with their limited means, had undertaken to receive and pay for cotton exceeding in value greatly more than they were worth, and that appellants induced them to speculate through them as their agent, with such an understanding or agreement. There are so many facts and circumstances leading to the opposite conclusion as to the intention of both parties when these trades were made as leave no doubt as to the correctness of the judgment below. We are aware that the business of this cotton exchange involves the greater part of the trade in the country's greatest staple, and that leading merchants and business men engage in such transactions, but this in no manner relieves the case from the vicious features of this class of contracts.

Men, no doubt, of both personal and commercial integrity

enter into such contracts. They are nevertheless pirates upon the legitimate trade and commerce of the country. Fictitious values created by a speculation that causes the fluctuation in prices from day to day of all the leading products of the country, based upon a species of gambling more ruinous to the people than any other, result from such contracts as were made in this case. They will not be enforced by the courts of this State.

There are many questions raised as to the pleadings and evidence not necessary to be considered, as from the testimony of the plaintiffs alone these judgments were proper.

Judgment affirmed.

W. W. Tice and W. Lindsay for appellants.

Robertson & Robbins, Hargis & Eastin and C. L. Randle for appellees.

JOHNSON, &c. v. STEWART, &c.

(Filed March 20, 1879—Not to be reported.)

A tenant for life can not lay out money in building on the land and charge it on the estate in remainder, or make it a personal charge against the remainderman, and the mere fact that the life tenant may have supposed that he had the absolute title to the property does not prevent the application of the rule.

Appeal from Louisville Chancery Court.

Opinion of the court by Judge Hines.

The only question to be considered is whether appellee, claiming through the life tenant, I. R. Jacob, is entitled to recover against the infant appellants, owners of the remainder, for lasting and valuable improvements made on the land by the life tenant.

The cases in general where the courts have allowed compensation for lasting and valuable improvements, made by the complainant upon the land of another, have proceeded upon the ground of fraud, estoppel by conduct or mutual mistake as to title.

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At the time these improvements were made the appellants, in whom the remainder subsequently vested, were not in being, and they are still infants. They were incapable of perpetrating a fraud or of binding themselves by contract or by estoppel. There could, of course, be no such thing as a mutual mistake as to when the fee was vested or would vest. If I. R. Jacob made the improvements upon the false assumption that he had absolute title to the property, he was not led to that conclusion by the conduct of these appellants, nor of any one through whom they claim. Under the same will that gave the life estate to I. R. Jacob these appellants claim the remainder, and the mistake, if made, was with full knowledge on the part of I. R. Jacob of all the facts that went to affect the title.

In this controversy it is immaterial whether I. R. Jacob was induced by the trustees to make the improvements or made them without persuasion or advice from any one. The rule is, that a tenant for life can not lay out money in building on the land and charge it on the estate in remainder, or make it a personal charge against the remainderman, and we have found no adjudged case making this an exception. (Gray v. Oyler, 2 Bush, 256; Cannon v. Hare, 1 Tenn. Ch. Rep., 22; Hoffick v. Stober, 11 Ohio St., 482; White v. Arndt, 1 Wharton, 91; Doak v. Wiswell, 38 Me., 569; Maddocks v. Jellison, 11 Me., 482.)

A majority of the cases relied on by counsel for appellee, in which payment for improvements has been allowed, are cases where the person making the improvements did so in good faith, believing the property belonged to him. In this case I. R. Jacob must be presumed to have known what his interest was, and to hold otherwise would not only work a hardship to appellants, but would be to establish a rule under which the life tenant could destroy the estate in remainder by simply insisting that he did not understand the legal effect of the evidence of title under which he entered.

If appellee was entitled to compensation the court could not give it, as was done in this case, by setting aside to appellee and vesting in her the title to another specific piece of prop-

erty, the legal title to which is in appellants. There is no power in a court of equity to thus divest title.

Wherefore, the judgment is reversed and cause remanded, with direction to dismiss so much of the petition as seeks to recover for the improvements made on the property by I. R. Jacob.

P. B. Muir for appellants.

Harlan & Wilson for appellees.

KENTUCKY SUPERIOR COURT.

SHINDLER v. HAYDEN'S ADM'R.

(Filed March 30, 1887.)

1. The pledgee of negotiable notes or other choses in action can not, in the absence of a special contract providing that he may do so, sell them, either by decree of foreclosure or by giving notice; but he must secure their value, so far as it may be his duty to do, by collecting them and applying the proceeds to the satisfaction of the principal demand.

2. The holder of collateral paper guilty of laches, whereby the assignor is damaged, makes the paper his own, and must account to the debtor for the sum which he could have made by pursuing the maker of the paper with ordinary diligence.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Ward.

On the 10th day of February, 1882, appellants executed their note to appellee's intestate for \$500, at six months, with interest from date. At the same time they assigned to Hayden a note which they held against John J. Sharp for \$525, with interest from January 4, 1882, due one year after date, and secured by lien on land.

In February, 1886, appellee instituted suit upon the note for \$500, and in his petition alleged that the note above described had been assigned to secure its payment; that it was secured

by lien on land; asked for a personal judgment for his debt, and a sale of the collateral note for its satisfaction. Appellee answered, alleging, in substance, that the maker of the collateral note was solvent for two years after its maturity; that in February, 1885, he left the State insolvent, and after continued to be a nonresident and insolvent; that the land had greatly depreciated in value, and was then, at the time the answer was filed, worth only \$400; that the intestate lived a neighbor to the maker of the collateral note, and made no effort to collect it. He claimed that he had been damaged by the failure of the intestate to collect the note to the extent of its depreciated value, and asked that this sum be set-off against the demand sued on, and that plaintiff be compelled to accept the collateral in satisfaction of the note sued on.

To this answer a demurrer was sustained, and a personal judgment rendered for the debt sued on, and an order entered, directing the master to sell the collateral and apply its proceeds to the satisfaction of the debt. In case defendant replevied or paid the debt he could withdraw the collateral and prevent its sale.

It is now well settled law in this State that the assignee of a note or bond, taken as collateral to secure another debt, must exercise ordinary diligence in collecting the collateral; and if he fails to do so he will be responsible to his assignor for the damage sustained by reason of his default. (Nolan v. Clark, 10 Ben Mon., 241; Banta v. Curry, 3 Bush, 678; Hays & Watkins v. Wheatley & Co., 7 Ky. Law Rep., 668.)

In this, as in other cases, where property is pledged to secure the payment of a debt, it is the duty of the pawnee to take ordinary care; and he is answerable only for ordinary neglect, for the bailment is beneficial to both the debtor and creditor. To the one it is a security for the debt; by it the other is enabled to procure credit. The note itself is of very little value; it is evidential merely; and if lost the amount due by the maker might nevertheless be recovered; so, in the nature of the case, the care which the pawnee is required to exercise

must be that which looks to the substantive value of the thing, the collection of the debt. But the appellee, by accepting the collateral note, did not relinquish any of his rights against his debtor. The assigned note was accepted as a collateral to the main undertaking, and he could, therefore, sue upon the principal demand without resorting to his collateral at all, if he so desired. Neither were the obligations of the debtor lessened by the fact that he had given the collateral. It was his duty to pay his debt when due, and at all times after it was due. Clearly, therefore, appellee had the right to sue upon the principal demand.

Thus far the case is simple enough, and here the difficulty begins. Appellee claims that he has the right to have the value of the collateral note ascertained by a sale of it, so that its value may be applied to the extinguishment of his debt, and that he may proceed against the debtor for the balance. This relief was granted to him by the judgment appealed from.

Appellants' claim that appellee violated his contract in failing to exercise ordinary diligence in collecting the assigned note, and by this breach appellants were injured to the extent of the sum which ought and could have been collected; and that they have the right, by way of counterclaim, to set-off the damages against the note sued on. The allegations of the answer, admitted by the demurrer to be true, sustain appellee's contention in fact, if in law he is entitled to such relief.

First, as to appellee's contention and the correctness of the judgment below, Chancellor Kent says the pawnee has the election of two remedies as to the pledge: "He may file a bill in chancery, and have a judicial sale under a regular degree of foreclosure; and this has frequently been done in the case of stocks, bonds, plate and other chattels pledged for the payment of debts." The other remedy is to sell on notice. (Kent's Commentaries, volume 2, side page 582.)

But we apprehend that this language was used with reference to long-time bonds and stocks, which have a well-known and recognized market or commercial value, and which pass as

money at what they are worth, and was not intended to apply to promissory notes and choses in action which have no market value, and are primarily, or intrinsically, worth what can be collected on the debt which they evidence, or what the owner may, according to his necessities, agree to take from one who can be induced to buy.

The language of the text above quoted has been referred to in several well-considered cases, and the rule seems to be now well established, both in principle and authority, that the pledgee of negotiable notes, or other choses in action, can not, in the absence of a special contract providing that he may do so, sell them, either by decree of foreclosure or by giving notice; but he must secure their value, so far as it may be his duty to do so, by collecting them and applying the proceeds to the satisfaction of the principal demand. (Wheeler v. Newbold, 5 Duer (N. Y.), 29; Nelson v. Wellington, 5 Bosworth (N. Y.), 179; Brookman v. Metcalfe, Ib., 429; Morris Canal Co. v. Lewis, 1 Beasley (N. J.), 323.)

Mr. Colebrooke, in his work on Collateral Securities, says, in reference to the duties of the pledgee: "He must collect and apply the securities, at their maturity, to the payment of the debt, in the case of promissory notes and bills of exchange, though sale may be made when the collateral securities are long-time negotiable bonds." (Section 87, page 117.)

The argument is that, it being the duty of the pledgee to take care of the property, to realize its value, and to apply it to his debt, and the pledgee being the legal title holder and the only person primarily authorized to collect or to sue, and as the usual way for owners to realize on promissory notes is to collect them, the law will not, in the absence of a custom known to the parties, and with a view to which it may be supposed they contracted, or, in the absence of a special agreement, infer that the parties intended anything but that the holder should take the usual and ordinary steps to realize on the demand, which is to sue, if not paid at the proper time.

Another argument is that the interests of the parties are

not advanced by a sale. To procure the decree for sale costs, both in time and money. The maker of the collateral may fail, or his ability to pay diminish during the time spent in procuring a decree. The object provided for by the assignment, the application of the debt due by the maker of the assigned note to the payment of the demand due by the assignor to his principal, is in no way advanced by the sale.

As to the position insisted upon by appellant we have shown that he is correct in the position that it was the duty of appellee to collect the assigned note, and if he failed to do so, then he is responsible in damages. What is the criterion of damages where the laches complained of does not destroy the value of the collateral paper by releasing some of the obligors, or by the absolute and total insolvency of the makers? As to commercial paper, if the person who takes it as collateral fails to take the proper steps to hold the parties bound thereon, he may be liable for the face of the paper. As it has been sometimes stated, he, by his laches, makes the paper his own. (Colebrooke on Collateral Securities, section 88, page 188, and authorities in note 3; *Stevens v. Morrow*, 4 Ind., 425; *Jennison v. Parker*, 7 Mich., 355.)

The correct rule seems to be to confine the damage to the actual loss sustained by the culpable default of the pledgee, to be ascertained by the difference between face value and what ought to have been collected. When does the assignor of the paper sustain this damage, and when may he set it off, by way of counterclaim, against the amount due by him on the principal demand?

In this case the collateral has not been collected; the maker is, according to admitted allegations, insolvent and a nonresident; he is beyond the jurisdiction of the court; but it can not be said is hopelessly insolvent. The property taken in lien for the note has some value, it is averred \$400. Shall we, therefore, say that appellant's damage was sustained at the time his contract was broken so that he could set it off, by way of counterclaim, then or whenever thereafter sued on the

principal demand? Or shall it be said that his damage matured at the time he was sued on the principal debt, and that he had the right to set up his counterclaim against the principal debt, the difference between the actual value of the collateral note at that time and what could have been collected thereon, or shall it be said that as he admits that the note has some value, and as it can not be known what that value is until the process of law has been exhausted, and as it is his duty to pay his debt, he at present has no counterclaim? He must pay his debt, he must get possession of the collateral paper and sue on it, and for what he fails to collect he may maintain his action against appellee.

All the questions assume, as the basis for a claim of damage by appellant, that appellee collected something, all, or a part of the assigned note, also that what he could have collected should, at that time, have been applied to appellant's credit. To the extent, therefore, that appellant was entitled to this credit he is not primarily in fault; but the fault is with appellee. He is, to that extent, excused from paying for this reason: If appellee had performed his part of the contract appellant, to that extent, would have been relieved. Ordinarily this makes out a ground for relief. To say that appellant shall not recover until he pays and until he exhausts legal process, because he ought to have paid sooner, is to excuse appellee, for the time being, for his default; is to allow a party in fault to recover; is to blame a party for not paying when the means he had to pay with was in part, at least, wrongfully withheld from him. It is to deny him a right to-day, which it is admitted he has, and to compel him to await another day, by which time he may be remediless by the death or insolvency of the wrongdoer. If his damages are to be confined to the difference between what appellee might have collected and what appellant may collect, then they can not be ascertained in this suit because it can not be known what may be collected. If they are to be confined to the difference between what could have been collected and what the note is supposed

to be worth at this time, this might do appellant injustice, since he might not collect so much; and it would be resorting to a speculative mode of fixing the value of the note, contrary to the contract, and more to be condemned than ascertaining its value by sale. It would bring about the anomaly of making both parties own an interest in the note, for if appellee paid for part of it, by way of damages for failure to collect, and appellant redeemed it so far as it was then collectible, both would own to the extent of his interest, the appellant being entitled to that first collected.

Reason and the analogies of the law, therefore, concur in the rule as stated in *Stevens v. Morrow*, 4 Ind., 425, that the holder of collateral paper guilty of laches, whereby the assignor is damaged, makes the paper his own, and must account to his debtor on the principal debt for the sum which he could have made by pursuing the maker of the collateral paper with ordinary diligence.

It results that the demurrer to the answer was improperly sustained, and for that reason the judgment is reversed and the case remanded, with instructions to set the judgment aside, to overrule the demurrer to the answer and for further proceedings consistent herewith.

G. G. Gilbert for appellant.

John A. Fulton for appellee.

COURT OF APPEALS ABSTRACTS.

BLAND v. THOMAS, &c.

Filed March 19, 1887. Appeal from Nelson Circuit Court. Opinion of the court by Judge Bennett, affirming.

Warranty—T., by deed with warranty of title, sold land to V. The latter mortgaged the land to M., with covenant of warranty. M. assigned the mortgage to appellant. V. having been adjudged a bankrupt, the land was sold by his assignee, and appellant became the purchaser, V.'s assignee making him a deed. B., prior to the sale by T. to V., had instituted suit against T. for the purpose of recovering the land or enforcing a claim against it, and after that sale, the court adjudging that B. had a line the land was sold to satisfy it, C. becoming the purchaser. C. thereafter assigned his purchase to appellant, who paid the purchase price, and appellant now sues T. to recover upon his warranty of title the amount thus paid, alleging the facts as stated. Held—That a demurrer to the petition was properly sustained, as it does not appear that the claim of B. was such an encumbrance upon the land as T. was, by reason of his covenant of warranty of title, bound to discharge in order to protect the remote vendee.

C. T. Atkinson and J. A. Fulton for appellant; J. D. Wickliffe for appellees.

SHUCK'S EX'OR v. McELROY, &c.

Filed March 19, 1887. Appeal from Marion Circuit Court. Opinion of the court by Chief Justice Pryor, setting aside order allowing damages.

Supersedeas—Damages—An executor was invested by will with the legal title to property to be held in trust during the life of another. The life tenant having relinquished her interest to the remaindermen, and the trustee refusing to pay over to them the trust fund, they instituted this action to recover it, and the court gave them judgment therefor, requiring the plaintiffs to execute to the executor a bond of indemnity. The executor appealed superseding collection of the judgment. The judgment was affirmed and this court awarded damages.

Held—That this was improper. The will under which the executor held was the subject of judicial construction, and the court is not prepared to say that he should be compelled to pay the damages out of his own pocket, and to pay it out of the trust fund would not avail appellees anything. Moreover, a part of the judgment was to be paid in stocks and bonds, the

court reserving the right to enforce it by rule or attachment. Again, it does not appear that the bond required has been given, and no execution could go for that reason.

Rountree & Lisle for appellant; Harrison & Belden and W. C. McChord for appellees.

• JULIAN v. STEPHENS.

Filed March 22, 1887. Appeal from Franklin Circuit Court. Opinion of the court by Judge Lewis, reversing.

Ejectment—Pleading—Appellant instituted this action to recover a tract of land purchased by him at a tax sale. The action was at first improperly placed on the equity docket, and in the petition, to which a demurrer was sustained, the plaintiff undertook to set out the proceedings had by the sheriff in making the sale at which he purchased. Subsequently the action was transferred to the ordinary docket, and an amended petition in the nature of an action in ejectment was filed. After an answer had been filed a demurrer to the amended petition was sustained and the action dismissed.

Held—That as the amended petition stated a cause of action, the action of the court was improper. Notwithstanding the plaintiff's previous pleading, he might, upon the trial of the case as an ordinary action, have given in evidence, under the general issue raised by his last petition and the answer thereto, any additional facts in support of his cause of action, not being precluded from doing so by anything before alleged by him. It was, therefore, error to cut off a trial of the issue by the jury.

G. W. Craddock and W. H. Julian for appellant; W. H. Posey for appellee

FICENER v. FICENER.

Filed March 22, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Chief Justice Pryor, affirming.

Divorce—Power to set aside judgment—The grounds for setting aside ordinary judgments at law or in equity after the expiration of the term do not apply to judgments for divorce, which become final. During the term, however, and while the condition of both parties remains unchanged, the judgment may be set aside at the instance of the plaintiff, but not without notice to the defendant.

In this case, during the term at which the wife had obtained a judgment for divorce, the judgment was set aside upon her motion without notice to her husband. The husband moved to set aside the order setting aside the judgment, but his motion was overruled. The wife then filed an amended petition praying for a divorce from bed and board, and asserting certain property rights as against the husband. The husband answered, making his answer a cross petition, and asked for a divorce and a restoration of the property he had conveyed to the wife. The chancellor, upon final hearing, dismissed both petition and cross petition. Held—That it was an error to set aside the judgment for a divorce without notice to the husband, but as he did not stand by his motion to set aside the order, but litigated the wife's

right to the property in controversy, and sought to obtain a divorce from her, and in the investigation it appears that neither party is entitled to be heard, the court will not reverse the judgment.

A. C. Rucker and Richards & Hines for appellant; O'Neal, Jackson & Phelps for appellee.

SEILER, &c. v. BRENNER.

Filed March 22, 1887. Appeal from Kenton Chancery Court. Opinion of the court by Judge Bennett, affirming.

Judicial sales—Purchase for firm—B. was the only bidder for real estate at a judicial sale, and the property was "knocked down" to the firm of B. & S., of which B. was a member. It appears that it was agreed by B. & S. that the property was to be purchased for the firm, to be used in the firm business, and that after the purchase it was agreed that the purchase should be entered in the name of S., and that he should appear as principal in the bonds for the purchase money, with B. as surety, in order to avoid calling on others to become their surety. S. appeared and moved for a deed to himself. B. resisted the motion, claiming that the purchase was for the firm, and, pending that motion, instituted this action against S., which was heard with the motion, to prevent S. from perpetrating a fraud on the partnership by procuring a deed to himself with the intention of conveying a part of the property to D. The chancellor ordered D. to be made a party, and he appeared, claiming to have purchased one-third of the property from B. & S., or from S. with B.'s consent. S. stated in his answer that the sale to D. was by writing in D.'s possession. D. adopted the answer of S., but the writing referred to is not filed, and its terms are not specifically set out. Held—That the property was bought by B. & S. as a firm and for the firm, and that it does not sufficiently appear that D. ever purchased an interest in the property from the firm or from S. by the authority of B. Nor does it appear that if the purchase was made that there was a sufficient written memorandum to satisfy the requirements of the statute of frauds.

Hallam & Myers for appellants; Cleary, Hamilton & Cleary for appellee.

PARRISH, &c. v. CHRISTOPHER.

Filed March 24, 1887. Appeal from Madison Circuit Court. Opinion of the court by Judge Lewis, affirming.

Subcontractor's lien—If a principal contractor has taken from the owner of a house security for labor performed and materials furnished in its erection, has been paid in full, or is liable in damages for a breach of contract for an amount greater than the balance of the contract price due, he has no lien, and consequently a subcontractor, between whom and the owner there is no privity, can have none.

In this action by a subcontractor against the owner to enforce an alleged lien for labor performed and materials furnished, the contractors being made defendants, the issue was made by the pleadings whether the owner

was or not at the date of the notice indebted to the principal contractor an amount sufficient to satisfy the subcontractor's demand, and the master commissioner, to whom the case was referred, reported in favor of the plaintiff, and that report was confirmed by the lower court and judgment rendered accordingly. Held—That in view of the impartial report of the commissioner, and the conflict in the evidence, this court is not authorized to disturb the judgment of the lower court.

S. D. Parrish for appellants; A. J. Reed for appellee.

PERKINS v. TOWERS, &co.

Filed March 26, 1887. Appeal from Caldwell Circuit Court. Opinion of the court by Judge Bennett, affirming.

The will of a married woman undertaking to devise her general estate is void.

Husband and wife sued to recover a tract of land alleged to belong to the wife as her general estate. Pending the action the wife died, leaving a will devising all her estate to her husband. The husband thereupon filed an amended petition, claiming the land under the wife's will. Held—That the will passed to the husband no estate, either legal or equitable, and that his petition was properly dismissed.

G. W. Duvall for appellant; James R. Hewlett for appellees.

NEEDHAM v. LOUISVILLE & NASHVILLE R. R. CO.

Filed March 26, 1887. Appeal from Jefferson Court of Common Pleas. Opinion of the court by Judge Holt, affirming.

1. Degree of negligence a question for jury—Whether one has been guilty of neglect is not only a question of law, but of fact, and it is peculiarly the province of the jury to find the degree of negligence.

In this action under the statute for willful neglect resulting in the death of the plaintiff's husband, an employe of defendant, a special finding by the jury that the death was not caused by the willful neglect of the defendant was sufficient to authorize a verdict for defendant, even though the other findings were not sufficient to enable the court to determine whether there was willful neglect. Therefore, the plaintiff's motion to set aside the verdict and award a new trial upon the ground that there was not a complete verdict was properly overruled.

2. Master and servant—It is the duty of the master to use ordinary care in providing for the use of the servant safe machinery and premises in safe condition. He is not, however, an insurer, and as a general rule if the servant knows that the machinery or premises are unsafe, and without objection continues to use them and injury results to him, he can not hold the master responsible, although there may be cases where he has the right to rely upon the superior knowledge, or means of knowledge, of the master.

In this case it appears that it was the habit of switchmen in taking tracks into the depot to run along a path at the side of the track. In this path was

a dry well only partially covered with a car door. It is claimed that plaintiff's husband, a switchman, was killed by stepping into this hole, and being thereby thrown between the moving cars. The jury found that the defendant knew the condition of the premises, and had so known it for years. Held—That if the question of liability had been submitted to the court alone, or had properly belonged to it alone, the court would, by reason of this finding of the jury, probably have found that the plaintiff was not entitled to recover.

3. Ordinary care—The court properly instructed the jury that "ordinary care is that degree which is exercised by ordinary prudent persons under similar circumstances."

R. C. Davis and Mat. O'Doherty for appellant; Wm. Lindsay. W. H. Bruce and Lyttleton Cooke for appellee.

BULLITT v. CITY OF PADUCAH.

Filed March 29, 1887. Appeal from McCracken Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. A tax, in the form of a license fee, may be imposed under legislative authority upon any trade, profession or calling; and while such a tax must be levied on all alike in the same profession, it is not essential to its validity that every calling within the particular locality shall be required to pay the tax.

2. Same—Such a tax, when collected by a municipal corporation, may be applied to the payment of its indebtedness created either before or after the imposition of the tax.

3. Same—The appellee obtained an amendment to its charter empowering it to enact a license upon certain occupations and business pursuits, including attorneys at law, to aid in discharging the city's indebtedness, which consisted of bonds given by the city to aid certain railroad improvements that had been constructed so as to run within the city limits. The city council proceeded by ordinance to impose a license upon nearly every business pursuit, including lawyers, merchants, physicians, etc. Appellant refusing to pay, the ordinance was enforced against him. Held—That the ordinance was valid.

Gilbert & Reed and W. G. Bullitt for appellant; E. W. Bagby for appellee.

KRAFT'S GUARDIAN, &c. v. KOENIG, &c.

Filed March 31, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Lewis, affirming.

Deeds—Duress—Devise—This is an action by E. to set aside a conveyance by her to her half-brother and half-sister, the children of her mother by a second husband, of an undivided interest of two-thirds in certain real estate, the whole of which was devised to her by her father. The conveyance was executed six months after the grantor arrived at age and ceased to be the ward of H., whose wife was her aunt, and with whom she resided when the conveyance was executed, and had resided for several years. The plain-

tiff alleges duress, and ignorance of her interest in the property conveyed. She testifies that both her former guardian and his wife urged her to make the deed, and became angry because of her reluctance to do so, and that her aunt told her it would be a disgrace for her to refuse to carry out her mother's will, and threatened to drive her from the house if she did not execute the deed. The plaintiff is to some extent corroborated in her testimony. Her aunt does not testify or attempt to contradict the charges against her. A few days before the execution of the deed E. and her former guardian went to the law office of S. to consult him about the extent of her interest in this property, and S. drew the deed sought to be set aside, which, after several interviews, was executed by E.; S. represented to E. that her interest depended upon which one of two constructions was put upon her father's will, when it admits of but one; and by that the mother of E. was entitled to a life estate in the property, and E. the remainder. The deed falsely recites that whereas, under the will of E.'s father and under the will of her mother, the grantor and grantees have become the owners of the property conveyed; and whereas it is questionable whether or not the grantor has a larger interest than the grantees, it is desired that all of the parties shall individually own the property in equal parts, and that in consideration of the premises the property is conveyed. The testimony of S. tends to show that the grantor acted freely and intelligently in making the deed, but the chancellor excluded his testimony upon the ground he was the grantor's attorney, and that his testimony related to privileged communications. Held—

I. That even considering the testimony of S. there is enough in the record to show :

First—That the deed was not the free and voluntary act of the grantor, but that the measures used and influences brought to bear on her recent guardian and his wife were such that, while not amounting to actual duress, did constrain her will and overcome her free agency.

Second—That she was ignorant of the nature and extent of her interest in the property conveyed, and if not fraudulently deceived by her guardian in respect to it, she was deprived of the information it was his duty to give before influencing her to make the deed.

II. Though the beneficiaries of the deed are infants, and no fault or fraud can be imputed to them, still they have no right to profit by the fraud or coercion used by others in their interest.

III. Under a devise by a testator to his wife for the sole use and benefit of her and his only child the widow took a life estate and the child the remainder.

M. A. & D. A. Sachs for appellants; Frank Hagan and Charles G. Hulsewede for appellees.

LEWIS AND MASON TURNPIKE ROAD CO. v. THOMAS.

Filed March 31, 1887. Appeal from Mason Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

Turnpikes—Taxation to aid—A turnpike road had its beginning in Mason county and extended into Lewis county. The citizens of each county undertook to furnish the funds necessary to construct the road within its boundary, but there not being sufficient money raised in Lewis county to construct the road within that county the charter was amended and the owners of the property within a certain distance of the road in that county were taxed to aid in its construction, the taxes to be collected until the road was finished, to be appropriated to building the road where the taxable property was situated. This part of the road was divided into two sections, and when any one section was finished and paid for then the tax as to that section was to cease. The taxes were collected from time to time and applied to the construction of the road until two of the taxpayers, suing in the name of all, filed a petition in equity asking for a settlement of the accounts, alleging that they had overpaid the amount necessary to construct the road, and asking that the company be enjoined from making any further collection, and that the chancellor refund to them the amount overpaid. It appears that the taxes collected were sufficient to construct the road when properly applied, but the company claims that in order to complete the road at once, pursuant to the purpose of the amended charter, it borrowed money at 10 per cent. interest, and that when that interest is discharged there will be nothing due the taxpayers. Held—

First—That there was no authority conferred by the amended charter to borrow any sum of money in addition to the amount which the original charter authorized to be borrowed, and whether the taxpayers, who obtained stock in the road for taxes paid, be regarded as voluntary or involuntary stockholders, the burden of taxation can not be increased to pay interest on the money borrowed, although the company may be at least equitably bound to pay those who have loaned it money that was applied to the construction of the road.

Second—The taxpayers are entitled to recover of the company the amount overpaid without an averment of fraud or mistake. They were partners in the undertaking, and were required to invest only a certain amount of capital, and if those associated with them have received more than they were entitled to, on a settlement the amount will be adjudged to be refunded.

Third—The commissioner having reported a certain amount overpaid, less amount in hands of collector, and the court having rendered judgment for whole amount, including amount in collector's hands, that judgment is affirmed, and the company will be entitled to amount in collector's hands.

Fourth—One of the taxpayers in whose name the action was brought having died, there was no objection to the action proceeding in the name of the other.

Fifth—The chancellor will not undertake to say what part of the road shall

be repaired with the profits, although all the profits may have been applied to repairing that part of the road in one county to the exclusion of that part in the other county.

Barbour & Cochran and John G. Hickman for appellant; William Lindsay and Willoughby Rodman for appellee.

SUPERIOR COURT ABSTRACTS.

NIX & CO., &c. v. MENDERSON & CO.

Filed March 2, 1887. Appeal from Marshall Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. The creditors of a firm have no lien upon the partnership property for the payment of their debts except such as is derived through the partners.

2. Partnership property may be subjected to the payment of a debt against all the members of the firm. The reason for the rule which gives the partners a lien upon partnership property ceases in such a case.

The firm of N. & Co., composed of N. & W., brought this action to enjoin appellees from collecting an execution against the individual members of the firm by a sale of firm property, alleging that the debt upon which judgment was rendered was not a partnership debt, but a debt in which W. was principal and N. was surety; that the firm was insolvent and that the partners had a lien upon the partnership property for the purpose of having it applied to the payment of partnership debts. Held—That the property is subject, and that the injunction was properly dissolved.

W. D. Greer for appellants; Henry Burnett for appellees.

REEKS v. COMMONWEALTH.

Filed March 2, 1887. Appeal from McLean Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Tavern licenses—Appeals—The jurisdiction of the county court in granting tavern licenses is original and exclusive, and upon appeal to the circuit court the same case must be tried in that court which was tried in the county court, and, therefore, must be tried upon a bill of exceptions.

2. Same—That the order granting an appeal to the circuit court in this case described the county attorney, upon whose motion the appeal was granted, as "attorney for the Commonwealth," is immaterial, and the fact that others united in the appeal, while improper and unnecessary, did not affect the appeal.

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3. Same—The opinions of witnesses as to the necessity for a tavern license are of no value without the facts upon which they are based.

4. Same—The judgment of the circuit court reversing the order of the county court granting appellant a tavern license with the privilege of selling liquor was proper, it appearing that the place named, which is a town of two hundred or three hundred inhabitants, has already two licensed taverns with such a privilege, and no witness testifying that there is any desire upon the part of any one for an additional one.

Joe Haycraft for appellant; J. C. Jonson for appellee.

McDONALD BROS. v. WHITLEY COUNTY COURT.

Filed March 2, 1887. Appeal from Whitley Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Building contract—Appellee employed a contractor to build a courthouse according to plans and specifications furnished by appellants, who are architects. The work was to begin May 1, 1884, and be completed December 15, 1884. The contract provided: "In case any charges are made by said architects for supervision of the work extending over a longer time than that agreed upon for the completion of the work in this contract, on account of second party's failure to complete his contract within the time agreed on, they shall be deducted from the amount of the contract." After this contract was made appellants, being familiar with its terms, offered to superintend the work for \$700, and their proposition was accepted. The first contractor abandoned the contract, and it was let to another. The second contractor refused to insert the provision for the completion of the building by December 15, 1884, and the building was not finished until August, 1885. Appellants seek to recover for extra services in superintending after December 15, 1884. Held—That they can not recover. Their contract was without limit or conditions as to time, and all that appellee was obliged to do was to have the work done within a reasonable time.

2. Consideration—If a contract was made for supervision after December 15, 1884, it was without consideration, as appellants did nothing more than they were bound under their original contract to do.

R. D. Hill for appellants; C. W. Lester for appellee.

DUNN, &c. v. BEDFORD, &c.

Filed March 2, 1887. Appeal from Monroe Circuit Court. Opinion of the court by Judge Ward, affirming.

Pleading—The fact that the plaintiffs are styled in the caption to the petition as the county judge and justices of a named county, without an allegation in the body of the petition that they are such, does not authorize them to maintain an action for the use and benefit of the county without making

the county a party, even if it be admitted that they could maintain the action if such an allegation had been made.

G. M. Miller and M. T. Flippin for appellants; Lewis McQuown for appellees.

THOMPSON, &c. v. ROGERS.

Filed March 2, 1887. Appeal from Nicholas Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Appeals—Estoppel—R. recovered judgment against D. and J. The judgment was replevied by D., who, on an execution, paid the judgment. D. was surety on the note on which the judgment was rendered, and after he paid the debt he took an assignment from R. under the statute, and, on an execution against J. issued for his benefit, realized a part of the amount he had paid. Thereafter this appeal was granted to D. and J. by the clerk of this court. Held—That they are not precluded from asking a reversal of the judgment.

2. Usury—It is the duty of the court, without a plea, to purge a contract of manifest usury.

Ross & Owens for appellants; J. P. Norvell and Kennedy & Son for appellee.

HORNBACK v. MERRILL.

Filed March 2, 1887. Appeal from Spencer Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Pleading—The plaintiff alleged in his petition that the defendant "with force and violence, and wantonly and maliciously, assaulted, shot and wounded him." The defendant in his answer denied that he "assaulted, shot and wounded plaintiff with force or violence, or wantonly and maliciously." No objection was made to the answer. The verdict and judgment were for plaintiff. It appears that the case was tried as if the denials had been made by the use of the disjunctive "or" instead of the conjunctive "and." Held—That the verdict can not now be set aside because the issue which the parties supposed was properly made by the pleadings, and which was in fact the issue tried before the jury, was defectively presented.

2. Grounds for new trial—It is not sufficient, in support of a motion for a new trial, to allege as a ground that "there was an error of law occurring at the trial and excepted to by the party making the application."

3. Same—The statement as a ground for a new trial that "the verdict and decision in this case are contrary to law" does not mean that the verdict was not sustained by the evidence.

4. A new trial can not be granted on account of the smallness of damages in an action for injury to the person. No special damage being alleged in this case, the question is not presented whether the rule would be different if the verdict were less than special damages laid and proved.

James W. Head for appellant; G. G. Gilbert for appellee.

GRUNDY v. COMMONWEALTH.

Filed March 2, 1837. Appeal from Kenton Criminal Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Separation of witnesses—Where witnesses have been sworn and separated, and it is subsequently discovered that one who has heard the other witnesses testify knows facts important to be proved, he may be sworn and allowed to testify.

2. "Common gambler"—Evidence—Games played in other States are evidence tending to show that the defendant is a common gambler, where that is the offense for which he is being tried.

3. Self-crimination—Under the statute which provides that "In any prosecution for a penalty against gaming it shall be no exemption for a witness that his testimony may criminate himself; but no such testimony given by the witness shall be used against him in any prosecution except for perjury," when a self-criminating answer is given to a question asked by the Commonwealth, whether given without objection or not, it must be conclusively presumed, upon the trial of that witness for any offense except perjury, that the question was proper, the answer material, and that it was such testimony as the statute will not permit to be used against him.

It was error to allow the Commonwealth to prove, upon the trial of appellant for being a common gambler, that he had testified upon the trial of another for suffering gaming that he made his living for the most part by gaming, the testimony being in response to the question by the attorney for the Commonwealth as to how he made his living.

R. Richardson and Hallam & Myers for appellant; W. W. Cleary for appellee.

SPRINGFIELD FIRE AND MARINE INSURANCE CO. v. McNULTY.

Filed March 2, 1837. Appeal from Hardin Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Insurance—Mistake of agent in writing application—When an agent to take applications for fire insurance undertakes to write the application and the owner answers honestly and truthfully all questions asked him, he may rely on the agent to write the answers as given, or in such form as to give the company such information as the questions were intended to elicit; and if the agent writes false answers without the knowledge of the owner, the latter will not be bound by the paper although he may have signed it, and the company can not escape liability on the ground that the answers as written were false. The agent has full power as to the matter intrusted to him, and his act is the act of the company.

In this case the insured, in answer to the question as to whether or not he had a fee simple title to the property, stated that he held a title bond for the land, and owed \$1,000 of the purchase money. The agent, in writing an answer to the question, stated the title as held in fee simple, with an encum-

brance of \$1,000. The agent, in making a survey of the property, saw that a stove pipe ran up through a drum fixed in the roof, but the owner, telling him that it was his intention to put up a brick chimney, the agent wrote in the application that the pipe ran into the chimney.

Held—That although the owner signed the application, yet as he had made true answers and did not know what the agent had written, he is not precluded from recovering.

2. Authority of agent to make survey—An application for fire insurance contained a diagram of the insured property, and under the heading "Questions to be Answered by Agent," the solicitor stated in response to printed questions that the diagram was correct; that he had surveyed the risk personally, and fully recommended it. Held—That this was distinct notice that in this matter the solicitor acted as agent, not only for the purpose of soliciting the business, but for the purpose of making a survey, and the company can not deny that as to this matter he was agent "for the purpose of examining property."

J. P. Hobson for appellant; Montgomery & Poston for appellee.

KENDALL v. CROUCH.

Filed March 2, 1887. Appeal from Harrison Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing and setting aside order granting cross appeal.

1. Usury—Payments made on a note will first be applied to extinguish principal and interest, and it is only the excess that can be recovered by the debtor as usury paid.

2. Same—Where a note has been renewed the obligors may require a proper application of payments, although made as usury, and show that the renewal is in whole or in part composed of usury.

3. Novation—While the execution of a new note by different obligors, or by a part only of existing obligors, may constitute a novation, the parties will not be permitted by such a novation to evade the law in regard to usury.

4. Voluntary payment—One who replevies a judgment against him and pays the replevin bond does not pay voluntarily.

5. Limitation—The statute limiting the right to recover usury paid to one year after payment does not apply to payments made under a judgment where there has been a reversal, and the proceeding is to enforce restitution.

6. Cross appeal—It is only an appellee who may prosecute a cross appeal, which is taken by an entry on the records of this court. An order granting a cross appeal to one not made a party to the appeal is set aside.

A. H. Ward for appellant; T. T. Forman for appellee.

CHESAPEAKE, OHIO & SOUTHWESTERN R. R. CO. v. GRAYSON COUNTY.

Filed March 9, 1887. Appeal from Grayson Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Taxation—Delinquents—Where the owner of property has failed to list

it for taxation it is the duty of the sheriff in office at the time the failure is ascertained to report the fact to the county court, as provided by section 25 of article 5, chapter 92, General Statutes.

2. Change of ownership—Neither the State nor the county loses its right to have property listed for taxation by the change of ownership, and where the owner of property has failed to list it his remote vendee may be required to do so.

In 1876 the E. & P. R. R. Co. failed to list for county taxation that portion of its road lying in Grayson county. In 1882 appellant became the owner of the property, and in 1884 the sheriff then in office reported to the county court that the property was not listed for taxation for the year 1876, and summons was issued against the appellant. Held—That appellant may be required to list the property for that year.

3. Neither State nor county taxes are barred by limitation, nor does either State or county lose its right to have property listed for taxation by the lapse of time.

4. Failure to list property—Under the provisions of article 5, chapter 92, General Statutes, where the owner of property who has failed to list it for county taxation is not willfully in default, all that the county court has power to do after it has determined that the property is liable is to direct its clerk to take the list of taxable property in the manner prescribed by law, thus leaving it to the clerk to fix the value of the property.

5. Appeal from county court—The county court, in determining that the property is liable to taxation, acts judicially, and from its judgment so determining an appeal may be prosecuted to the circuit court.

In this case the county court erred in fixing the rate of taxation unless its direction in that regard was a mere recital of the amount which had, by the county court, been legally levied; and the circuit court erred in directing the clerk as to the valuation to be fixed.

Holmes Cummins and George W. Stone for appellant; W. H. Julian, J. S. Worthham and A. Duvall for appellee.

TINGLE v. BEASLEY.

Filed March 9, 1887. Appeal from Henry Circuit Court. Opinion of the court by Judge Ward, reversing. Judge Barbour not sitting.

Attachments—Where there is no evidence to sustain an attachment the mere fact that the plaintiff would, as against the defendant, have the right to retain so much of the proceeds of the attached property bought by him as would satisfy his debt is no reason for sustaining the attachment, and thereby depriving the defendant of his right of action, if he desires to assert it, for wrongfully suing out an attachment.

Carroll & Barbour for appellant.

COOPER'S ADM'R v. CUNNINGHAM, &c.

Filed March 9, 1887. Appeal from Trigg Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Breach of warranty—A vendee can not recover of either his immediate or remote vendors for the breach of a covenant of warranty where it appears that the land of which he has not been put in possession was embraced in his deed and in deeds of both his immediate and remote vendors by mistake that the land was not sold to him and was never claimed by his immediate vendor, and that he had notice of all these facts when he purchased.

2. Practice—The judgment of the court in an action at law, wherein a jury has been waived and the law and facts submitted to the court, is to be treated in many respects as the verdict of a jury, and must be so treated as to reserving objections and exceptions, and moving for, and filing grounds for, a new trial.

Fenton Sims and R. A. Burnett for appellant; Dabney & Crenshaw for appellees.

BRUCE v. LEWIS COUNTY.

Filed March 9, 1887. Appeal from Lewis Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Contract to care for county paupers—Appellant, for a consideration, obligated himself to "take charge of and keep the county paupers who are, or hereafter may be, sent to the infirmary by order of the county judge, * * * and to do so free of all charges and costs to the county." He now seeks to recover compensation for keeping persons sent to the infirmary by the county judge as paupers upon the ground that they were not paupers, and that he received and cared for them under protest. Held—That he can not recover. The decision of the county judge as to who are paupers is conclusive under the contract.

2. Landlord and tenant—Whether, under this contract, the county is to be regarded as the owner of the premises and the appellant as its servant, or whether the county is to be considered as a landlord and the appellant as its tenant, the county is not liable for the expense incurred by appellant in repairing damages done by flood, the county not having covenanted to rebuild.

3. Injunction—No court can enjoin the county judge from exercising his judgment in deciding who may justly be sent to the infirmary.

E. C. Phister for appellant; Samuel J. Pugh for appellee.

KENDALL & BRO. v. CARTER, &c.

Filed March 9, 1887. Appeal from Morgan Circuit Court. Opinion of the court by Judge Ward, affirming.

Practice—Amended petition—In an action upon a promissory note the plaintiff obtained a personal judgment, which was the only relief to which he manifested any right. The case was allowed to remain upon the docket,

and eighteen months after judgment was rendered plaintiff filed an amended petition alleging that execution had been issued on the judgment and returned "no property," and asking to have certain lands subjected, and that defendant be compelled to make a disclosure as to any property owned by him. Held—That the original action was terminated when the personal judgment was rendered, and the court had no power to keep it on the docket longer. The amended petition was, therefore, properly dismissed.

Hazelrigg & Orear for appellant; John E. Cooper for appellee.

HEDGER v. HENSLEY, &c.

Filed March 9, 1887. Appeal from Scott Circuit Court. Opinion of the court by Judge Ward, affirming.

1. Bills of exceptions—Depositions used in evidence upon the trial of an ordinary action in the lower court can not be considered in the appellate court unless they are identified by an order of the court or embodied in the bill of exceptions signed by the judge.

2. Same—A verdict can not be called in question by an appeal on the ground that it is not sustained by the evidence unless the evidence is stated in full in the bill of exceptions.

In this case the bill of exceptions shows that a number of depositions were read on the trial below which are not embraced in it.

Owens & Finnell for appellant; Jas. E. Cantrill and Geo. E. Prewitt for appellees.

EASTERN KENTUCKY R. R. CO. v. CARTER COUNTY, &c.

Filed March 9, 1887. Appeal from Carter Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Taxation—Appeal from county court—Where a taxpayer has failed to list his property, and there is an order by the county court to list, the defendant may appeal to the circuit court, whether the proceeding is under section 20 or section 25 of article 5, chapter 93 of the General Statutes; and the defendant having the remedy by appeal, can not call upon a court of equity to enjoin the collection of the tax.

2. Repeal of statutes—The act of April 8, 1878, did not repeal the act of March 17, 1876, with respect to taxes for preceding years.

The property of appellant is liable for taxes assessed against it by the county authorities for the years 1876 and 1877.

E. F. Dulin and R. D. Davis for appellant; J. D. Jones and W. H. Julian for appellees.

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KENTUCKY COURT OF APPEALS.

KENTUCKY UNION R. R. CO. v. BOURBON COUNTY, &c.

(Filed January 29, 1887.)

1. An act regulating the "manner of voting" in "all votes of subscription and taxation therefor for railroad purposes" applies to votes where the question submitted is "whether or not stock shall be subscribed," and not merely to vote where the question of levying the tax is submitted.

2. There can be no valid and enforceable subscription of stock by the county court on behalf of a county without power to levy and collect taxes to satisfy it.

3. The power of a county court to make a subscription of stock for the county and to levy taxes to meet it is conferred by express grant, to which the legislature may annex any condition not repugnant to the Constitution.

The legislature, therefore, has the power to require, as a condition precedent to the validity of a subscription of stock by a county court for railroad purposes, not only a majority of all votes cast in the county, but also a majority of those residing outside of the limits of a certain town in the county. Such a statute does not work any inequality or discrimination, and the provision of the statute construed in this case that "no tax shall be imposed for said purpose upon the property of those residing outside said limits unless the votes of a majority of the voters thus residing outside said limits shall be cast in favor of such subscription and tax," was not intended to cast the whole burden, or any burden at all, upon those within the limits of the town in the event a majority of those outside the limits should vote against the proposition.

4. The provisions of the statute are not foreign to the subject expressed in the title, the subject expressed being "the manner of voting in Bourbon county on questions of tax for subscription to railroad companies." The phrase "manner of voting" may fairly be applied to determining and declaring the result of a vote.

5. The county court, in making a subscription of stock on behalf of the county, acts ministerially and not judicially, and the circuit court has power to declare such a subscription void when made without authority of law, and to enjoin the collection of a tax to pay it. Holt, J., dissenting.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Lewis.

May 9, 1885, the Bourbon County Court, composed of the presiding judge and a majority of the justices of the peace, made an order directing the sheriff to hold an election at the usual voting places in that county, to ascertain whether or not a subscription of 4,000 shares of stock of \$100 each to the capital stock of the Kentucky Union Railway Co., payable in the bonds of the county, should be made by the county court for and on behalf of the county, upon the terms and conditions set forth in the order.

In that order is the following provision: "And the sheriff is directed to have such election in the Paris precincts so held as to have the votes of all voters residing in the limits of the city of Paris, as they existed under the act of March 5, 1868, made and received separately from the votes cast by the remainder of the county, it being provided by an act approved March 18, 1876, that no tax should be imposed upon the property of those residing outside said limits, unless the votes of a majority of the voters then residing outside said limits shall be cast in favor of said subscription and tax."

It was further provided that "the vote for subscription shall not be binding upon the citizens and property in that portion of the county embraced in what were the limits of the town of Paris as they existed under the act of March 5, 1868, unless by law the same is also binding upon the citizens and property of the county outside said limits."

It appears, and is agreed, that at the election held in pursuance of that order the whole number of votes cast in the county in favor of the subscription of stock was 2,218, and the whole number against it 1,650, and that there were cast by voters of the county residing outside the limits of the city of

Paris as they existed under the act of March 5, 1868, in favor of the subscription, 1,805 votes and against it 1,547. But nevertheless the county court, composed of the presiding judge and justices, on June 5, 1885, after first reciting that the returns of the special election held May 23, 1885, had been laid before, examined and considered by the court, and that it appeared a majority of the votes cast at said election was in favor of said subscription, and the proposition to subscribe to the capital stock of the Kentucky Union Railway Co. had been duly accepted by a majority of the legal voters of said county, according to the provisions of the charter of said company, made an order that the court then, by its agent, J. M. Hughes, appointed for the purpose, subscribe the number of shares of stock mentioned in the order of May 9, 1885, and upon the terms and conditions therein contained, and thereupon J. M. Hughes, as agent, did, in presence of the court, make the subscription, and it was adopted and approved by the court.

This action was instituted June 12, 1885, by J. W. Ferguson and others, residents and taxpayers of Bourbon county, against the Kentucky Union Railway Co., the presiding judge and justices of the peace of Bourbon county, and J. M. Hughes, the county clerk, and in their petition they asked that the company be compelled to surrender the subscription of stock made in the manner mentioned, and the same be adjudged void and of no effect; that the presiding judge be enjoined from executing or delivering said bonds and the members of the county court from levying or collecting any tax to pay the subscription stock or the bonds that may be issued.

The same relief was asked in the cross petition of Bourbon county filed by the presiding judge of the county court.

Upon final hearing it was adjudged by the lower court that the subscription of stock is void and of no effect, and that the county court be enjoined from issuing any bonds or levying any tax on account of said subscription of stock, and from that judgment the Kentucky Union Railway Co. has appealed to this court.

The authority under which the county court acted in making the subscription of stock complained of, and upon which appellant relies, is section 19 of the act of 1854 incorporating appellant, which is as follows:

"It shall be lawful for the county court of any county * * * through which said railway or its branches may be located, and they are hereby authorized to subscribe and hold stock in said company upon the same restrictions as other stockholders, provided it shall first be submitted to vote of the legal voters of such county, * * * to be held and taken at such times and places and in such manner as said authorities respectively may appoint, whether or not stock shall be subscribed and taken; and if, when the vote be taken, it shall appear that a majority of the votes shall be in favor of such subscription, it shall thereupon be lawful for such county court, * * * by county court, city or town authorities, by agents by them appointed to subscribe and take in said company such amounts of stock as they shall determine, and to issue the bonds of such county, city or town, payable with interest at such times and places as they may deem proper, and dispose of the same for the payment of such subscription, and pledge the faith and resources of such county, city or town for the payment of such bonds and interest, and they shall, from time to time, levy and collect such tax, ad valorem, upon all taxable property in their respective jurisdictions as shall be necessary to pay said bonds and installments of interest as the same become due, or to create a sinking fund for the gradual reduction of the same, provided that the rate of interest on the bonds shall not exceed ten per centum per annum. Or the funds to pay for such subscription of stock may be raised by such county court, city or town authorities by an ad valorem tax on the taxable property in their respective jurisdictions in such sums or installments as will meet such subscriptions," etc.

On the other hand, appellees insist that the vote in this case could not have been legally taken in any other manner, nor the subscription of stock made upon any other conditions, than

are prescribed in an act approved March 18, 1876, which is as follows:

“An act regulating the manner of voting in Bourbon county on questions of tax for subscription to railroad companies:

“Be it enacted, etc., that in all votes of subscription and taxation therefor for railroad purposes hereafter to be made within the county of Bourbon, the portion of the county outside the limits of the city of Paris, as they existed under the act of March 5, 1868, shall vote separately from the portion of the county embraced within said limits; and no tax shall be imposed for said purpose upon the property of those residing outside said limits, unless the votes of a majority of said voters, thus residing outside of said limits, shall be cast in favor of such subscription and tax.”

It is contended for appellant that act has no application to the vote we are considering because the question authorized by section 19 of the act of 1854, to be submitted, and which was submitted and voted on, is “whether or not stock shall be subscribed,” whereas the act of 1876 relates merely to “questions of tax for subscription for railroad purposes,” and in support of that position the case of *Bullock v. Curry*, 2 Met., 171, is cited.

There it was held that the submission of the question of subscription merely, though voted for by a majority, was not sufficient to justify the action of the county court in levying the tax because the statute in that case provided, in express terms, that before a subscription could be made or tax levied the question of levying the tax should be submitted.

That case shows what can not be disputed, that there is a distinction between a subscription of stock and levy of tax, and that a vote for the former without authority of law will not justify the latter.

It was not, however, there decided that it would have been improper to submit to the voters the question of subscription, as well as that of levying the tax, for every proposition of that kind should contain the terms and conditions of the sub-

scription, and the manner, provided by the act authorizing the vote, in which it is to be paid.

But that case has no bearing on the construction of the act of 1876, which must be determined by its own terms and the purpose of its passage. By it the legislature, in our opinion, intended to so amend section 19 of the act of 1854, and all other railroad charters applicable to the county of Bourbon, as that hereafter no subscription of stock should be made in behalf of that county, nor taxes to pay it imposed upon the voters residing outside the limits mentioned, against the will of a majority of them, for "subscription of stock and taxation therefor" are mentioned in the act connectively, and, according to a fair construction, made to depend upon the same condition.

It seems to us, if the provisions of the act of 1876 do not apply to appellant's charter, they are utterly without force or meaning.

But it would not avail even if the operation of the statute was limited to the question of taxation, for there can be no valid and enforceable subscription of stock by the county court on behalf of a county without power to levy and collect taxes to satisfy it, that being the only mode by which it can be paid. And if made in the absence of such power, or in violation of the condition upon which it is delegated, the subscription would be worthless and void.

It, then, being evident that section 19 of the act of 1854 is, so far as it authorizes a subscription for Bourbon county, without the assent of a majority of voters residing outside the limits indicated repugnant to the act of 1876, it follows that the subscription in question was made by the county court without authority of law, and it is void if the latter act is valid and in force.

Whether it is or not, therefore, becomes a vital question in this case, and we will now consider the several grounds upon which it is disputed:

1st. It is argued that it violates section 3, article 2 of the Constitution, which declares that "no law enacted by the

General Assembly shall relate to more than one subject, and that shall be embraced in the title.”

This court has uniformly held that this provision should receive a reasonable, not a technical, construction. And the rule laid down in *Phillips v. Covington & Cincinnati Bridge Co.*, 2 Met., 219, has never been departed from. It is this: “None of the provisions of a statute should be regarded as unconstitutional when they all relate, directly or indirectly, to the same subject, have a natural connection, and are not foreign to the subject expressed in the title.”

Tested by this rule we think none of the provisions of the act are liable to the objection made.

The subject of the title of the act is “the manner of voting in Bourbon county on questions of tax for subscription to railroad companies.”

There seems to be no objection to the first clause. But it is contended the subject of the second clause is not embraced in the title.

The phrase “manner of voting,” literally interpreted, applies simply to the act of voting, which is provided for in the Constitution, but by itself signifies nothing. It is, therefore, plain that a more comprehensive meaning was intended and should be given to it. And if so, why may it not fairly be applied to the counting of the votes and ascertaining the result of the voting? It seems to us there is a natural connection between “regulating the manner of voting” and prescribing rules or tests by which to determine and declare the result, which was the object of the clause in question. Moreover, any one reading or hearing read the title would be informed that the act was intended to regulate the manner of voting in a particular county and on a particular question, independent of any other statute, and, therefore, readily infer that it contained the necessary provision for determining the result of such election.

2d. It is next contended that the act violates section 1, article 10, which declares that “all freemen, when they form a social compact, are equal, and that no man or set of men are entitled

to exclusive separate public emoluments or privileges from the community, but in consideration of public services," and also section 7, which provides that "all elections shall be free and equal."

The argument of counsel to some extent is based on a mistake as to the true construction and effect of the statute.

In our opinion the only subscription of stock allowable under the act is one made for and on behalf of Bourbon county, binding on and payable by the whole, not a portion of the county, and consequently, if the subscription be legally made, all the property of the county alike, without regard to its location or the residence of the owner, may be taxed to pay it, but if not so made none can be taxed. There can, under the act as we construe it, be no inequality or discrimination between taxpayers in the assessment of taxes, as is contended.

The act, in substance, provides that no tax shall be imposed for the subscription upon property of those residing outside the limits of the city of Paris, as they existed under the act of 1868, unless a majority of them vote in favor of the subscription and tax. But obviously it was not intended that in case a majority of them voted against the proposition the whole burden, or any burden at all, should fall on those residing within those limits.

The meaning and effect of the act is to require not only a majority of all the votes cast in the county, which sufficed under section 19 of the act of 1854, but also a majority of those residing outside the limits mentioned, in order to authorize the subscription and tax. And thus construed is the act in violation of either of the provisions of the Constitution quoted?

In considering this question it must be kept in view that the power of a county court to make a subscription of stock for the county and to levy taxes to meet it is conferred by express grant, to which the legislature may annex any conditions not repugnant to the Constitution, or withhold it altogether in any case.

It may, as has been often held, authorize such subscription

and levy for a county, or for specified districts of a county, contiguous to and supposed to be more directly benefited by a proposed railroad, exempting others more remote, or already accommodated with a railroad. It may require a majority of those voting, or a majority of all the votes of the county, or of each district affected, or more than a majority of all, in order to authorize a subscription and tax.

While there may be restraints upon the power of the legislature to impose local burdens for the construction of railroads or other enterprises projected by and for the benefit of private corporations or individuals, there is and ought to be full legislative discretion and power to prevent unjust, oppressive and improvident taxation for such purposes against the will of those upon whom the burden principally falls.

Enforced subscription of stock against the will of the minority to be taxed therefor could not be tolerated except upon the assumption that from the investment the taxpayer will receive a return, and that the advantage to the county or district taxed will compensate for the burden imposed. But experience teaches that a return of dividends upon taxes paid to build railroads is delusive, while a sense of justice dictates that residents of a county or portion of a county already accommodated with a railroad, and having no interest in the new enterprise, should be protected against a reckless and improvident imposition of taxation by those who will bear no part of the burden, combined with others who are more immediately and directly interested. And, in our opinion, the legislature has the undoubted power to provide against such injustice by needful restrictions upon the power to tax for such purposes.

The act of 1876 does not confer the apparently undue influence upon those residing outside the limits of Paris in order to enable them to vote the subscription and tax against the will and to the detriment of those residing inside the limits, for to do so requires a majority of all the votes of the county cast at the election, and in making up such majority the votes of all are of equal weight. But the purpose and effect of the act

is to protect the class mentioned against the imposition of taxes, about seven-eighths of which they will have to pay, for the construction of railroads by others and without their consent, and in which some of them may not have any direct interest.

We do not understand how an act thus intended, and which operates as a mere safeguard against what might be a heavy and unjust local burden, imposed for the immediate benefit of the owners of a railroad charter, can be regarded as the grant of exclusive privileges and emoluments.

The statute is intended to protect and conserve the interests and rights of a district or geographical division of Bourbon county, and does not confer, directly or indirectly, a personal privilege at all, much less an exclusive privilege, in the meaning of the Constitution.

In our opinion the act of 1876 is not invalid for either the reasons mentioned or any other.

The next ground relied on for reversing the judgment is want of jurisdiction in the circuit court, it being contended that the act of the county court complained of is judicial and not ministerial, and that the only remedy of appellees was by appeal to the circuit court.

Section 19 of the act of 1854, under the authority of which the vote was taken and the subscription made, is not mandatory, but merely permissive in its terms, and appellant had no fixed or vested interest in the subscription until after it was made, nor right to demand such subscription, nor, on the other hand, was it bound to accept the subscription when made. Consequently there was no opposing or adverse interests or rights for the county court to determine and adjudicate. But the duty was imposed to perform the ministerial act of ascertaining the result of the election, and as agent of the county to subscribe or not the stock.

The power of the circuit court to declare a subscription of stock made by the county court without authority of law void and enjoin collection of tax to pay it has been often upheld by this court and never denied.

In *Bullock v. Curry*, 2 Met., 171, this court held that even after the subscription had been made and bonds issued the circuit court had jurisdiction to interpose at the suit of taxpayers and enjoin the collection upon the ground that the county court had no authority to subscribe the stock because the proposition was not submitted to the voters in the form required by the statute, though it is proper to state the bondholders were not before the court in that case.

Jurisdiction of the circuit court in such cases was held to exist in *Bowling Green & M. R. R. Co. v. Warren Co.*, 10 Bush, 711; *Mercer County Court v. Kentucky River Navigation Co.*, 8 Bush, 300, and *Judge of Campbell County Court v. Taylor*, 8 Bush, 206.

We are, however, referred to the case of *Shelby County Court v. Cumberland & Ohio R. R. Co.*, 8 Bush, 209. In that case there was a proceeding by mandamus to compel the county court to issue the bonds, a subscription of stock having already been made, and it was held that the county court, in deciding upon the question of compliance by the company with the various conditions upon which the subscription was voted, and in which another railroad company had an interest, acted judicially.

But in this case there was a subscription without any question being raised or determined in which appellant had an interest or the right to litigate.

In our opinion the statute of 1876 being valid and in force, the county court had no authority to subscribe the stock in violation of the conditions contained in that act, which was done, and the subscription so made must be held void and of no effect.

Judgment affirmed.

Judge Holt delivered the following dissenting opinion:

If I were in doubt as to what seems to me to be the main question in this case my high regard for the opinion of the other members of this court would solve it.

However questionable may be the policy of municipal sub-

scriptions to railroads, and other like enterprises, their legality, when made under legislative sanction, is now, by reason of an unbroken line of decisions, extending from the Supreme Court of the United States to that of nearly every State in the Union, beyond doubt. The question of their expediency is for the legislature, and not the courts. The result of this litigation may vitally affect the interests and future development of a large portion of our State; while, upon the other hand, if the subscription now in question be held valid, it may prove a grievous burden to a particular locality.

These considerations, however important as they are, can not be allowed to produce a particular conclusion, but should induce careful investigation and consideration.

The case of the Shelby County Court v. C. & O. R. R. Co., 8 Bush. 209, renders it at last a doubtful question whether the action of the Bourbon County Court in making the subscription was judicial and not ministerial, and, therefore, not subject to question by this character of proceeding. It is also at least questionable whether the second clause of the act of March 18, 1876, is not open to objection by reason of the constitutional provision that no law shall relate to more than one subject, it to be expressed in the title. I pass these questions by, however, as another is to my mind decisive of the case; and enter upon its discussion recognizing the well-settled rule that the constitutionality of a legislative act is to be presumed. If a matter of doubt, it is to be resolved; slight implication or vague conjecture will not suffice to set it aside upon this ground; but when clearly unconstitutional it is one of the highest duties of a court to do so, not upon the ground that the judicial power is superior to the legislative, but because its action is in violation of the fundamental law, and it is the duty of the court to so declare.

Under the 19th section of the act of 1854 the right of a majority of the voters of Bourbon county to vote the subscription is indisputable. The effect of the act of March 18, 1876, is to so abridge it that no subscription or tax for railroad

purposes can be made or imposed upon the property of the county unless a majority of the voters outside of the city limits, as they existed in 1868, vote for it. Such legislation is partial and unequal. It violates not only the spirit of the Constitution, but its express provisions, and is destructive of that sense of equality that created it. I concede that the legislative power over the subject is supreme, save as restrained by our Constitution; and that it can impose whatever limitations it pleases, provided they do not violate the fundamental law; but when it creates inequality of privilege, and attempts to say that the vote of one taxpayer shall count, while that of another shall not, when the question relates to the imposition of a tax upon all the property of the county, it passes its constitutional limit. It must be borne in mind that it is a question whether the burden shall be imposed upon all the property in the county—in the city of Paris as well as out of it. It is also a question whether the taxpayer living in one locality, as well as in the other, shall have a voice as to the expected benefit to the county to be derived from the building of the road. If the right to vote upon this question is given to one taxpayer, then it must be given to all with like effect and weight. This is a constitutional right.

The first section of the Bill of Rights provides:

“That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community but in consideration of public services;” while the seventh section says: “That all elections shall be free and equal.”

It is urged that these grand declarations do not refer to a case like this one, but to offices and political matters, or the machinery of government only; and that the vote of the electors is but an agency used by the legislature to determine a conditional law shall become operative. Also that the powers not given the privileged class of voters to impose any burden on the others, but merely to cast a negative vote by way of defeating a tax.

The power of taxation is essentially a governmental one. None affects the elector more. The legislative acts under consideration make him the controlling power as to the imposition of the tax, and the reception of the expected benefit from the construction of the road. The right to subscribe for such a purpose, and the implied duty then arising upon the part of the municipality to pay the subscription by taxation, is based upon the idea that a public benefit is to accrue from it. Each elector is, therefore, interested in the question; and granting that he is but an agency of the legislature, yet when it makes him such, and gives him a voice in the matter with another elector as to this question of common benefit, the right must be equal, and the one not privileged above the other.

It is none the less a forbidden privilege or partial legislation because it merely gives the one the right to defeat the imposition of a tax, and puts no burden upon the other. It does create an equality of privilege, and an unequal voice in the matter because it says that the one may defeat the expected common benefit without regard to the wish of the other elector, and it is not, therefore, a mere shield. Thus, although there may be a majority of a thousand votes in the city of Paris for a measure which concern them as much as the balance of the county, yet a majority of one vote in the territory outside of the city controls. Upon the other hand, suppose the city votes a thousand majority against it; yet if, upon a count of the entire vote of the county, there be one majority for it, the subscription must be made.

The act in question, however, goes further than this. It does not merely disfranchise electors as to a matter of common interest, but it creates an inequality of privilege among the taxpayers or persons standing upon the same footing.

Of course the legislature may say that one precinct in a county shall alone vote upon such a question, upon the idea that it alone will reap the expected benefit, but in such a case the tax must be imposed upon it alone.

Grant, also, that the legislature may require the assent, for

instance, of two-thirds of the taxpayers of the county before a subscription can be made. Yet in this instance the vote of the taxpayer in one locality of a county, the whole of which is to be affected by the imposition of the tax or benefited by the building of the road, is omnipotent to defeat the votes of the taxpayers in another portion of the county. In fact they do not count at all if he votes differently. A majority of one outside of the limits of the city of Paris, and which vote may be cast by one who is not a taxpayer, renders nugatory the votes of all the taxpayers in the city. Thus an unequal effect is not only given to the votes of the electors, but to those who are taxpayers. The idea that one vote may in effect disfranchise hundreds of electors equally interested in the question is, to my mind, utterly inconsistent with that equality of right which is the life of our Constitution.

There are other objections to the act of March, 18, 1876. The taxation of real estate for local purposes depends upon its situs, and not the residence of the owner.

Under the act of 1854 the city of Paris may subscribe stock in the road, and the owner of city property, although resident elsewhere, must pay the tax. The act of 1876, however, provides that no tax shall be imposed upon the property of those residing outside of the city unless a majority of the voters residing without the city limits vote for it. Thus the right to tax is made to depend upon the residence of the owner, and not upon the location of the property; and if the city were to take stock in the road, as it may do under the act of 1854, yet if A owns one-half the property in the city but resides elsewhere in the county, it is not taxable, thus creating inequality of taxation.

Again, the act of 1876 provides that a majority of the votes outside of the city limits, as they existed in 1868, is to govern, and not as they may exist at the time of taking the vote. It appears that these limits were larger in 1868 than now; and it results that those living between the two lines are residents of the county and not of the city save when a vote is to be taken

as to a subscription to a railroad, and then they are city residents. In this way electors who in fact live in the county and not in the city are in effect disfranchised.

The will of the majority who now in fact live outside of the city may be defeated by a majority of one vote of those who reside outside of the city limits in 1868; and yet those living between the two lines must help to bear the burden if a tax be imposed, and are equally interested in the expected benefit.

Entertaining these views, I regret that I can not concur with my associates in an affirmance of the case.

A. Davall, A. H. Ward, E. M. Dickson and P. B. Muir for appellant.

W. C. P. Breckinridge, B. F. Buckner, G. C. Lockhart and J. H. Brent for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. SIMMONS.

(Filed February 3, 1887.)

1. Railroads—Trespassing stock—Where stock strays upon a railroad track, even from the unenclosed lands of the owner, the company has no remedy for the trespass unless its road is within a lawful enclosure, and even then the company must answer in damages for injury to the stock, if caused by the negligence of the company.

In this action against appellant to recover the value of mules killed by its trains the appellant pleaded as a counterclaim the damages sustained by reason of plaintiff's negligence in allowing his stock to stray on the track, the plaintiff's alleged negligence consisting in his not having a good and lawful fence, such as would keep the mules within his own enclosure. The damages claimed resulted from the wrecking of the train by reason of the collision with the stock. The company's road was not enclosed. Held—That a demurrer to the counterclaim was properly sustained.

2. Same—The killing of stock by the cars of a railroad company is prima facie evidence of negligence, and the burden is on the company to show that the killing was the result of an accident that could not have been avoided, under the circumstances, by the exercise of ordinary care and diligence.

Appeal from Bullitt Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee instituted this action in the court below against

the railroad company for negligently killing two mules belonging to him that were run over by a freight train in charge of its employes. The appellant filed its answer, making the third paragraph a counterclaim against the appellee, asking indemnity for damages sustained by reason of the appellee suffering his mules to stray on its track, alleging negligence in this regard, and that the train was wrecked thereby, causing great damage to the company, and for which they ask a judgment. The negligence of the appellee consisted in not having a good and lawful fence, such as could keep the mules within his own enclosure. A demurrer was sustained to this counterclaim, and the principal question upon this appeal is whether or not the counterclaim presents a cause of action.

The rule of the common law is asked to be enforced in this case, and the owner made liable for the trespass of his stock, caused by his failure to keep them on his own land, or using reasonable precaution for that purpose.

At the common law the mere fact that the stock of the owner trespassed on the land of his neighbor did not authorize the latter to kill and destroy the stock. He might sue for the unlawful entry and the destruction of his crops and grass, but had no right to run over and kill the stock with his vehicles or horses, for the reason that they had broken his close.

If, in doing so, he injured his vehicle or destroyed that which he used in taking the life of animals, such an injury would not, at the common law, have been estimated as a part of the damages sustained by the trespass on his premises.

In this case, under instructions that were unobjectionable, the jury, by their verdict, has said that the mules were destroyed by the negligence of the appellant, or those in its employ, and that negligence not only caused the loss of the mules to the plaintiff, but wrecked the train of the defendant, for which he is now asking damages of the plaintiff. He could not, under such circumstances, have recovered at common law, and, therefore, the counterclaim, if a good defense, could not have availed in this case.

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The demurrer, however, was properly sustained. The railroad track is the private property of the company, and no one has the right to use it as a private passway or as a pasture for stock, yet where stock stray upon it, even from the unenclosed lands of the owner, there is no remedy for the trespass, unless the road of the company is within a lawful enclosure. There has been no intentional wrong shown on the part of the plaintiff in this case. He did not place his mules on the track of the road that they might wreck the train or prevent its passage. The animals had escaped from his possession, and were found on the track of the road, and whether their leaving the possession of the owner was or not, by reason of insecure fencing, is an immaterial inquiry. The right of recovery by the owner of land for the trespass upon it by the stock of others is made to depend upon the question as to whether or not the owner of the land had it enclosed by a lawful fence. If he had a lawful fence the right of recovery exists, and for every subsequent breach double damages may be recovered. (General Statutes, chapter 55, article 1, section 2.)

By article 4 of the same chapter the right is modified to this extent: If the owner of the stock have a lawful fence, and his stock break through it and trespass on the premises of another, not enclosed by a lawful fence, the owner is not liable for the first trespass, but is liable for the damages, by reason of all subsequent trespasses.

This section or article was framed doubtless on the idea that in breaking the lawful fence of the owner of the stock the latter was then notified of the vicious propensities of the animals, and that they could not be kept in even a lawful enclosure, and a lawful fence affording no protection to the crops of your neighbors, you must keep your stock at home, or be made liable for every trespass but the first.

Here the railroad company had no enclosure to prevent the trespass of animals upon it, and both the company and the appellee are claiming the possession and use of land around which there is no enclosure. Neither can maintain trespass by

Reason of the mere entry of stock upon such a possession. The right of recovery is denied by the statute, and the counter-claim was not a defense to the action. Nor would the fact of the company having its road enclosed prevent it from answering in damages for the injury to the stock, if caused by the negligence of the company. The statute makes the killing of stock under such circumstances prima facie evidence of negligence, and the burden is on the company of showing that the killing was the result of an accident that could not have been avoided under the circumstances by the exercise of ordinary care and diligence. (General Statutes, chapter 57, section 4.)

The judgment below is affirmed.

W. R. Thompson and Wm. Lindsay for appellant.

F. P. Straus and Richards & Hines for appellees.

JAMES' ADM'X v. TRUSTEES OF HARRODSBURG.

(Filed Feb. 17, 1887.)

Municipal corporations—Failure to abate nuisance—The failure of a municipal corporation to provide the means of abating a nuisance altogether on private property, or the omission of its officers to abate it when the means are furnished, gives no right of action against the corporation to those who are injured by this neglect of duty.

One who, in passing along the streets of a town, was injured by falling stones, the result of blasting by a citizen on his private property, has no cause of action against the town for its failure to abate the nuisance.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant's intestate was seriously injured by a stone thrown by a blast of powder that was made on the lot of one of the residents of the town preparatory to the erection of a building upon it by the owner.

An action was instituted by the person injured against the town of Harrodsburg, in which it is alleged that the excavation was made in the lot by the consent of the city, and the blasting of stone permitted for several days, the stones falling

in the streets of the city, so as to endanger the lives of its citizens and those passing, and finally one of the stones striking the plaintiff on the foot and crushing it, rendering him a cripple for life. It is alleged that the blasting, as it was conducted, was a nuisance, and so known to the officers of the city government, and they neglected to abate it, or take any steps for the protection of those passing against the danger. The plaintiff died and the action is here in the name of his personal representative, who has appealed from a judgment sustaining a demurrer to the petition, and dismissing the action.

It is not alleged that the nuisance was committed under or by the direction of the trustees of the town, or that the town had any interest in the lot or the excavation that was being made upon it. The lot formed no part of the public streets or alleys of the town, and the town was in no manner connected with the wrong, except in consenting to the erection of the building.

It is not alleged that the building or excavation was a nuisance, or endangered the lives of the people, but it is averred only that the mode of blasting the rock, conducted by the owner or those in his employ, was dangerous to the passerby, and resulted in the injury complained of.

The legislative power of the town may have authorized the abatement of nuisance, and the imposition of penalties by the authorities on those who create a nuisance on their own lots, and yet we are aware of no rule that would make the town liable in a civil action for a failure to pass ordinances for the suppression of such nuisances, or to enforce those laws, through the proper officer, when enacted.

The public streets of the town, under the immediate control of the trustees or the municipal authorities, must be kept unobstructed, and where an injury results to the citizen, by reason of a neglect of duty in this regard by the proper authorities, a civil action may be maintained, and so of other property within the corporate limits and belonging to the corporation. Here an action is attempted to be maintained by a

private citizen against the town because of the negligent conduct of the owner on his own lot in making an excavation by the use of powder, that has become dangerous to the adjoining property, or to persons passing on the street adjacent.

The city might have notified the owner to cease blasting, but the failure of the owner to comply with the request would not make the city liable for failing to take such action as was necessary to abate the nuisance. The town may have had no ordinance on the subject, and the remedy, if adopted, not adequate to suppress the wrong, and still, for the failure of either the legislative or judicial department of the town to perform its duty in this regard, no action would lie. The owner would be liable to an indictment at the instance of the public, and also to an action by the party receiving a private injury by reason of the wrong, but as to the town no liability would exist. The power of a town or city to suppress or abate a nuisance, like all other powers, is derived solely from the legislature, and that a town is responsible for not abating a nuisance, both to the public and to the private citizen, who has received a special injury, may, as a general rule, be conceded, but in all such cases the injury complained of must arise either from the neglect of the town in the attempt to discharge a public duty for the benefit of the public, such as improving its streets, digging its public wells, or erecting other public works, or in omitting to keep such improvements in a condition that protects the public or the private citizen from danger; in all such cases the town, if a nuisance is created by the neglect of its officials or by others on its public grounds, is answerable in damages, either to the State or to the citizen, or both, where a special injury arises to another.

The erection of improvements within a city being ministerial, the work must be done in an ordinarily skillful manner, and if not, and an injury results to the citizen, the town will be responsible. But for neglecting, through its officers, to discharge certain official acts, that is, to abate a nuisance on

private property caused by the act of the owner alone, no responsibility exists for a special injury.

In the case of *Davis v. The City Council of Montgomery*, 51 Alabama, 139, the house of the plaintiff was burned down by sparks from a steam engine used by the proprietors of an adjoining lot. Although the engine might have been abated as a nuisance, under the city charter, and the authorities had been notified of the danger, it was held that no recovery could be had.

The doctrine contended for in this case is that the town is bound to abate all nuisances within its limits, or be responsible in damages to those who may be injured thereby. This rule can not apply to a municipal corporation. The power to abate a nuisance may be expressly given, but the failure to provide the means of removing the nuisance, or the omission of its officers to remove it when the means are provided, gives no cause of action to those who are injured by this neglect of duty.

The party creating the nuisance is liable in a civil action, and may be indicted for the offense.

The charter of a town or city usually gives it the power to open streets, alleys, etc., and to take control of and the custody of those streets, as well as the public buildings and the public squares, and, therefore, it becomes the duty of the authorities to remove nuisances, and to prevent all obstructions in its public thoroughfares calculated to endanger the lives of those who are upon them.

In the case of *Parker v. The Mayor and Council of Macon*, 39 Georgia, 725, a dwelling had been destroyed by fire, leaving the walls of the building on the edge of the sidewalk. The wall was in such a condition as made it liable to fall at any moment, and injure those passing on the street. It did fall and injured the plaintiff, who sued and recovered damages.

The result in that case was made to depend on the duty of the city to keep its sidewalks and streets in a condition of repair that would render them safe for those passing.

It was argued in that case that the wall was private property,

but the court held that it was the duty of the city to remove anything hanging over the sidewalk which would probably work an injury to those passing. That case was likened to the case of a dry pit at the edge of the street, with no protection to prevent those passing from falling or stepping over; both were regarded as obstructions to the public way, and the city having the control of the streets, like an individual, could not create the nuisance, and should not, by reason of its charter contract, neglect the important duty of keeping such a way safe for those passing over it.

Here the stones constituted no obstruction to the street, although the lives of those passing were endangered. The city had neither the custody nor the control of the private property, and is no more liable for the special injury than if sky-rockets shot from the yard of the owner had caused the town to burn up, or had injured those upon the streets, or, as in the case from Alabama, where the sparks from the engine had destroyed the house of a neighbor.

There is a manifest distinction between the case before us and that of *Parker v. The City of Macon*.

In the last-named case the duty was imposed upon the party in possession of the absolute control of the streets for the public use of keeping them in repair, and it was as much its duty to remove the wall as it was to have taken the debris from the street after the fall. Its charter obligation bound it to discharge this duty.

In the case before us the town was empowered to legislate in regard to all nuisances, and the omission to provide a remedy against the owner of private property preventing the nuisance, or to execute an ordinance passed to prohibit such a nuisance, and to abate it, is made the foundation of the action. The failure to take legislative action, or to enforce the law when enacted, by entering upon the private estate of the citizen and staying the manner of the execution of the owner's work upon it, gives no cause of action against the city. The failure to exercise that governmental power, whether legislative or judi-

cial, is not within the class of cases or the rule by which the liability of the town is to be determined.

The judgment below is, therefore, affirmed.

P. B. Thompson and T. C. Bell for appellant.

O. S. Poston and R. P. Jacobs for appellee.

GILPIN v. HORD, &c.

(Filed Feb. 17, 1887.)

1. Liability on supersedeas bond—A sheriff and his sureties appealed to the Superior Court from a joint judgment against them. The judgment was superseded, the obligors in the bond, which was in the usual form, binding themselves as the sureties of all the defendants. The Superior Court affirmed the judgment as to the sheriff, but reversed it as to his sureties. No damages were awarded. This is an action on the supersedeas bond. Held—That the sureties in the bond are liable, although the judgment was reversed as to a part of the defendants, and although the Superior Court did not award damages.

2. Same—In order to hold the sureties in a supersedeas bond bound for the payment of the judgment superseded it is not necessary that the appellate court should, upon the affirmance of the judgment, award damages.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Bennett.

The appellant obtained a judgment in the Lewis Circuit Court against H. T. Warder, as sheriff of Lewis county, and others as his sureties, for the sum of eight hundred dollars, together with interest thereon, and costs.

The sheriff, Warder, and his sureties jointly appealed the cause to the Superior Court. The judgment of the circuit court was superseded by the appellees, as the sureties of all of the defendants, by executing a supersedeas bond in the usual form.

The Superior Court affirmed the judgment of the lower court as to the sheriff, Warder, but reversed the judgment as to his sureties.

Upon the return of the cause to the lower court the appellee caused execution to be issued against Warder on the judgment, which was returned with the endorsement thereon "no property

found." Thereafter appellant instituted this action against the appellees, as sureties on the supersedeas bond, for the purpose of recovering the amount of the judgment superseded.

The appellees contend that, as the judgment which they superseded was reversed as to all of the appellants except one, they are discharged from liability on the supersedeas bond.

We can not concur in this position. The judgment appealed from was a joint judgment against all of the appellants. They jointly appealed, and the supersedeas bond was executed by the present appellees on behalf of all of them. Therefore, the effect of the bond was to suspend the whole judgment, and to suspend the plaintiff's right to proceed against the defendants, either collectively or individually, to enforce the payment of his judgment. But for the suspension of his right by the act of the appellees he could have proceeded against any one of the defendants to enforce the payment of his judgment. But the appellees suspended his right to proceed against any one of the defendants individually or all collectively. The judgment was affirmed as to one of the defendants, against whom the plaintiff's right to proceed was suspended by the appellees covenanting to pay the judgment in case it was affirmed by the Superior Court.

The mere appeal from a judgment does not suspend the right of the successful party to enforce the satisfaction of it. That right can only be suspended by superseding the judgment. The object, then, in executing a supersedeas bond is two fold: First, that the appellant may have the judgment of the lower court reviewed without running the risk of the enforcement of the judgment during the pendency of the appeal, which might result disastrously to his interest; second, the successful party being deprived of his right to enforce the judgment during the pendency of the appeal, the sureties agree to pay him the amount of the judgment in case it is affirmed. Therefore, the consideration which upholds the bond is the depriving of the successful party of his right to enforce the satisfaction of his judgment, not only as against all of the parties who have super-

seded, but as against any one of them. Therefore, to hold that the reversal of the judgment as to only a portion of the appellants discharges the sureties in the bond from the payment of the judgment, which was affirmed as against the other appellants, would strike down the consideration of the bond, to wit, the suspension of the appellee's right to proceed against any one of the appellants to enforce the satisfaction of his judgment. This we can not do.

The fact that the appellant, against whom the judgment was affirmed, was insolvent, and the other appellants, who were discharged by the reversal of the judgment as to them, were solvent, which latter fact was the inducement for the sureties superseding the judgment, can not enter into the question of their liability to the appellee because his right to proceed against the insolvent appellant was suspended by the sureties, and in consideration of that fact they agreed to pay the judgment rendered against him if it was affirmed.

The foregoing views are sustained by the case of *Young v. Ditto*, 2 J. J. M., 72.

In that case Young obtained a decree against Ditto for \$171; against Kelso for \$198; and a joint decree against both for costs. Ditto having appealed, and his appeal having been dismissed, Young brought suit on the appeal bond, which suspended the whole decree. The court said: "If all appeal and execute a joint bond, each will be responsible for the whole amount. If only one execute the bond, he must stand bound for the whole. The appeal is not from a part of the decree, but from the whole of it. It suspends the whole. * * * As, therefore, by the appeal of Ditto the creditor was prevented from enforcing his decree against Kelso, Ditto is liable for the amount decreed against Kelso; and it is immaterial whether Kelso is solvent or insolvent."

The fact that the Superior Court, upon the affirmance of the case as against the sheriff, did not award ten per cent. damages on the judgment superseded does not show that the court regarded the supersedeas bond as discharged by reason of the rever-

sal of the case as to the other appellants. The omission, as frequently occurs, was merely an oversight. Besides, in order to hold the sureties on a supersedeas bond bound for the payment of the judgment superseded it is not necessary that the court, upon the affirmance of the case, should award damages. The ten per cent. which the successful party is entitled to upon the affirmance of the case is intended as, in a measure, compensatory for his trouble and delay in obtaining the benefit of his judgment. And whether the ten per cent. damage is awarded or not, his right to hold the sureties to the supersedeas bond bound for the judgment, interest and costs superseded nevertheless exists.

The petition and amended petition set up a cause of action upon the supersedeas bond. It is true that the petition alleges that the sheriff superseded the judgment by executing the bond, with the appellees as his sureties, and fails to allege that the other appellants caused the bond to be executed. But the fact appears in the preceding part of the petition that a joint judgment was obtained against the sheriff and his sureties, and that he jointly appealed to the Superior Court, and that the case was affirmed as to the sheriff, and reversed as to the sureties. The body of the bond is also substantially set out in the petition; and the bond itself was filed with the petition. So, looking at all of the allegations of the petition in reference to the facts which led to the taking of the bond, the conclusion is inevitable that the bond filed is the bond described in the petition; also the appellant who supersedes a judgment is not required to sign the supersedeas bond. The allegation that he did sign it must, therefore, be regarded as surplusage. Then, the allegation being regarded as eliminated from the petition, it appears that the sheriff superseded the judgment by causing the bond to be executed. And as it was sought to make the appellees liable on their bond, on account of the fact that the judgment had been affirmed as to the sheriff, it was unnecessary to add that the sheriff's co-appellants also caused the bond to

be executed, for the reason that the allegations of the petition identified the bond filed as an exhibit, with reasonable certainty, as the bond which the sheriff and his co-appellants caused to be executed.

For the foregoing reasons the judgment of the lower court is reversed, with directions to overrule the demurrer to the appellant's petition and amended petition and to sustain the demurrer to the appellee's answer and for further proceedings consistent with this opinion.

G. T. Halbert and A. H. Parker for appellant.

E. C. Phister for appellees.

ADAMS EXPRESS CO. v. CITY OF OWENSBORO, &c.

(Filed February 24, 1887.)

1. Taxation—Express companies—While as to useful trades and employments the power of a municipal corporation to license does not ordinarily include the power to tax, yet where useful occupations are, in this regard, placed upon the same footing as those which serve for amusement only, and the municipal charter provides that, in granting such licenses, the common council "shall charge such sum or sums of money as they shall deem fit and reasonable," they are authorized to use the power to license as a means of taxation if they see proper to do so.

2. Repeal of statutes—General words in a statute should not be construed as repealing by implication a particular statute unless they are otherwise inoperative.

The provisions in a city charter authorizing the city to tax express companies does not repeal the provision of the general law requiring foreign express companies to pay a certain tax to the State in lieu of all other taxation.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Holt.

The charter for the city of Owensboro, approved March 18, 1882, by subsection 36 of section 10, provides: "The common council shall have power to grant licenses to the following persons and business, and provide by ordinance adequate penalties for doing business without license, viz., tavern-keepers, inn-keepers, retailers of spirituous liquors, * * * concerts,

menageries, circuses, astrologers, * * * express companies, telephone companies," etc. (Acts 1881, volume 1, page 817.)

It is urged that the power to license does not include the power to tax, and that the distinction between the power to license as a police regulation and for the purpose of taxation must be kept in view. In the one a reasonable fee for the labor and expense of issuing the license can only be charged, while in the other it becomes a source of revenue.

It is not usual to resort to a tax upon useful occupations for revenue. The law draws a distinction between them and those which are harmful or serve merely for amusement.

Judge Dillon says: "Concerning useful trades and employments, a distinction is to be observed between the power to 'license' and the power to 'tax.' In such cases the former right, unless such appears to have been the legislative intent, does not give the authority to prohibit, or to use the license as a mode of taxation with a view to revenue, but a reasonable fee for the license and the labor attending its issue may be charged. Respecting amusements, exhibitions, etc., the authority of the corporation under the power to license has been regarded as greater than when the same word is employed as to trades and occupations." (1 Dillon's Municipal Corp., section 357.)

This rule is supported by the cases of *St. Louis v. Boatmen's Ins. Co.*, 47 Mo., 152; *Freeholders of Essex v. Barber*, 2 Halst., 67, and *Mays v. Cincinnati*, 1 Ohio St., 272.

A license may or may not include a tax. It is noticeable, however, that the charter provision *supra* includes both useful occupations and those which serve for amusement only; they are all put upon the same footing; and subsection 37 provides as to all of them: "And in granting such licenses, as by this act the common council is authorized to grant, they shall charge such sum or sums of money as they shall deem fit and reasonable, and annex to such licenses such terms and conditions as, in their opinion, the peace, good order and general interest of the city may require."

This last provision enlarges the scope of the preceding one, or at least shows that it was "the legislative intent" to confer upon the city council full power over the subject; and to authorize them to use the power to license as a means of taxation if they saw proper to do so.

It is urged that the words "as they shall deem fit and reasonable" must be construed to mean "as are fit and reasonable;" and authorize the imposition of a fee only for the issual of the license. There might be some ground for such a construction if they related to useful occupations only. The words "sum or sums" as used in the act do not mean merely "fee or fees." The sum to be charged is not for issuing the license, but for the license itself.

If the construction contended for be correct, and express companies can only be charged a license fee, then a saloon-keeper can be charged no more. It also follows that however proper it might be to charge one calling more than another, that yet it can not be done. This leads to an absurdity.

It is true subsection 27 authorizes the council, in its discretion, to license and tax places of amusement. Under it they may refuse to do so, and thus prohibit the business, because it says that they shall not be carried on without the license. Under subsection 36, however, they may or may not require the license, but can not prohibit the avocations therein named, and it enumerates useful occupations and those of amusement without distinction, and subsection 37 applies equally to all.

The appellant is, however, a foreign corporation. By the act of March 2, 1870 (Acts of 1869-70, volume 1, page 33), foreign express companies are required to pay a certain tax to the State in lieu of all other taxation. It expressly provides that they "shall not be required by any county, town, city or other corporation or local jurisdiction in this State to take out or obtain any other or additional license, or to pay any other or additional tax or sum of money for the right or privilege of conducting its business in or through such county, town, city, corporation or other local jurisdiction."

Clearly this act was not expressly repealed by the provision *supra* of the Owensboro charter. The latter is not an amendment of the former; and can not be considered as repealing the exemption unless by implication.

General words should not be construed to so operate as to a particular statute unless they are otherwise inoperative.

The act of March 2, 1870, indicated an intention upon the part of the State to exempt foreign express companies from local taxation by the payment of the State tax; and we are now asked to suppose that it intended to reverse the policy so announced as to, and for the benefit of, one particular city or local jurisdiction.

In the case of the Adams Express Co. v. The City of Lexington, 7 Ky. Law Rep., 716, where a provision of the charter of the city of Lexington identical in substance with the one now under consideration—in fact almost *totidem verbis*—was in question, it was held that the legislature did not, by its enactment, intend to repeal, as to one particular municipality, the exemption in favor of foreign express companies existing by virtue of the act of 1870 as to the towns and cities generally of this Commonwealth.

That case is decisive of this one; and the judgment below is reversed, with directions to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

Hallam & Myers for appellant.

IRVINE v. SCOTT.

(Filed February 24, 1887.)

1. Estoppel—One is concluded not only by what he does or says, but by the natural and reasonable inference from his declarations or conduct.

2. Where the tenant holds over under a renting which expired on a named day, the landlord may, at any time within ninety days after the expiration of the term, sue out his writ of forcible detainer under article 4 of chapter 66 of the General Statutes, unless something in addition to the mere holding over by the tenant has occurred to defeat the landlord's right to the possession; and neither the mere belief on the part of the tenant that he is to con-

tinue nor the implied understanding alone is sufficient to defeat the warrant. If, however, the landlord, without objection, permits the tenant to make arrangements to retain possession for another year and to make expenditures, under the belief that he is to remain, that belief being induced by the conduct of the landlord, the right of the landlord to adopt the remedy provided by the statute will be denied him.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is a controversy between the landlord and tenant in regard to the possession of a stable in the city of Lexington. It appears from the agreed state of facts that the appellant had rented this stable of the appellee for a number of years by parol. The renting was by the year, at the rate of twenty dollars per month, the rent payable monthly. On the 8th of October, 1882, the appellant and appellee entered into a written contract, by which appellant rented the stable for one year at the price of \$240, the rent to be paid, as under the parol contract, by the month.

The rent expired on the 8th of October, 1883, and the appellant still continued in the possession of the premises, paying to the appellee the rent at the end of each month, as under the former contracts of renting.

These payments were made for two months, and nothing said about the lease. At the end of two months the appellee demanded an increased rent, and the appellant refusing to pay a greater sum, this warrant of forcible detainer was issued, resulting in a judgment of eviction.

It seems that the appellant had filled his stable with provender for the ensuing year, and was proceeding to occupy the premises as he had done under the previous renting.

The right to maintain this warrant is based on the provisions of section 1, article 4, chapter 66, General Statutes.

That section was construed by this court in the case of *Mendel v. Hall*, 13 Bush, 232. It is there said that it was the duty of the tenant to abandon the premises at the expiration of his term, and that a holding over for a less period than ninety days gave the landlord the right to proceed against

the tenant without notice, and also the right to the tenant to abandon the premises within that time. When the holding over is for ninety days after the expiration of the day fixed by the lease for abandoning the premises by the tenant he then becomes a tenant for another year from the expiration of his lease. A contract for renting to expire on a certain day, where the tenant holds over, is distinguished from a tenancy at will or by sufferance, and it is in that class of cases where article 4 of chapter 66 applies.

By section 1 of article 6 of the same chapter "a tenancy at will or by sufferance may be terminated by the landlord giving one month's notice to the tenant requiring him to remove," but when, by the contract, a day is fixed for the renting to expire, and there is a holding over for ninety days, the tenant becomes a tenant for another year, and is not a tenant at will or by sufferance.

It is plain that under article 4 of chapter 66 the landlord may sue out his writ of forcible detainer without notice, where the tenant fails to leave on the day fixed, and has not held over for ninety days after the renting terminates.

In this case the renting expired on a named day, and there is no express contract to continue longer. Nothing was said about the lease, and, therefore, there must be some facts that defeat the landlord's right to the possession, in addition to the mere holding over by the tenant, or the eviction must take place. The mere belief on the part of the tenant that he is to continue is not sufficient, or the implied understanding alone will not defeat the warrant.

In this case it appears that the renting had been from year to year under the same contract, or the same terms, and a continued possession of the property by the appellant under a renting from year to year until this warrant was issued or the demand for an increased rent made. The holding over was by the consent of the landlord, and the monthly rent paid as formerly for two months after the expiration of the day the tenant should have left, but this alone would not be sufficient

to defeat the remedy of the landlord for the possession, but the latter stands by and permits the tenant to fill the stable with provender sufficient to last for the ensuing year, and then does not demand the possession, but an increased rent. It was in effect saying to the tenant, you can continue in possession, and make arrangements to retain possession for another year; and not only induces, but sees the tenant make an expenditure that no man of ordinary prudence would have made but for the conduct of the owner of the premises.

Under such circumstances the right of the landlord to adopt such a remedy as is provided by the statute will be denied him.

“The rule is clear and proper that one is concluded not only by what he does or says, but by the natural and reasonable inference from his declarations or conduct.” (Bigelow on Estoppel.)

The payment of rent establishes the relation of landlord and tenant, but here that relation is controlled by the statute. The landlord has, by his own conduct and his failure to speak or assert his claim, stood by and seen the tenant provide for the year's rent by an expenditure that works an injury to the tenant unless he can hold for the year. He believed that he had the right to hold for the year. That belief was induced by the act of the appellee, and the tenant acting upon it has done that which he would not have done but for appellee's conduct.

The judgment must then be reversed and cause remanded for proceedings consistent with this opinion.

Bronston & Kinkead for appellant.

C. Suydam Scott for appellee.

HENDRICKSON v. COMMONWEALTH.

(Filed February 26, 1887.)

Murder—Death from exposure—Where the husband uses such force and violence as to cause the wife to leave the house from fear of death or great bodily harm and she dies from exposure, the husband is not responsible for her death unless her fear was well grounded or reasonable, and unless her

Death was the natural and probable consequence of leaving the house at the time and under the circumstances; and the error of the court in failing to thus qualify an instruction as to manslaughter in this case was prejudicial, the accused being a cripple in one arm, and it appearing that the deceased, his wife, was able to whip him, and had done so.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Lewis.

Under an indictment for the murder of his wife appellant was convicted of manslaughter.

From the testimony of a daughter of the deceased and step-daughter of appellant, the only person present at the time, it appears that a difficulty took place at their residence at night after they had retired to bed in the winter of 1885-6, and in the language of the witness, occurred as follows: "The sow rooted open the door of the cabin, and they (her mother and father), fell out over driving her out, and he choked, beat, scratched and struck her, and she knocked him down with the iron shovel and got on him, choked him and asked him how he felt, and he started towards his breeches and said: 'If I had my knife, I will get my knife, and I'd cut your dog gon'd throat, and that she ran out at the door and did not return that night; that he shut the door after her and propped it with a stick of wood and went to bed.'"

She further stated that next morning she went to look for her mother and found her lying in the snow dead, and that when she started appellant told her to take her mother's shoes and stockings.

The statement to the jury made by appellant himself is that the deceased commenced the fight, getting him down on the floor, where he choked and bit her, and she then knocked him down with an iron shovel and got on and choked him, and then jumped up and ran out the door, saying she would have him arrested and put in jail. He, however, admits he said to her if he had his knife he would cut her, and started for his breeches.

From the testimony of a witness it appears that the place where the deceased lay was within about 100 yards of his house

and about half mile of her residence, and that in going to the place where she was found she had passed by the gate of another person, and within twenty feet of his house, which was 250 yards nearer her own residence than was the place where she died.

When found she was lying on her face dead, and badly frozen, the weather being extremely cold, and where she lay were signs of stirring in the snow, which was about eighteen inches deep.

When she left her residence she was barefooted, and had on very little clothing, and along the route she took, which led through briars, there were small quantities of blood and fragments of clothing that had been torn off by the briars, and at another place she had struck her ankle against the end of a log, and it bled freely.

The witnesses testify that there were scratches on each side of her neck and finger prints on her throat, and prints of teeth on her left arm and back of her hands, and her legs, from knees down, were lacerated by the briars.

According to the testimony of a physician she was eight months and one week gone in pregnancy, but she had no wound, bruise or other mark of violence that could have produced death. He also testified that appellant was badly crippled and paralyzed in one arm, and that on the day of his examining trial he had considerable bruises about his face, and a bad looking one about the eye.

There is evidence that the deceased was a high-tempered woman; hard to get along with. She told a witness of fighting and whipping her husband, who was a cripple, and had but one arm he could use, though the daughter testifies that in their fights he whipped her. It further appears that she had, on other occasions, ran off and left her husband, and at one time she came to the house of a witness and staid all night, leaving a young baby with her husband, saying to the witness that she had got mad and ran off.

The lower court refused to instruct the jury at the instance

of appellant's counsel, that before finding him guilty they must believe the death of his wife was produced by him alone, and in no other way. And also refused to instruct that in order to convict they must believe he intentionally exposed her, or forced her to expose herself, to the cold under such circumstances that her death would be the probable and natural consequence of such exposure, and that she died from such exposure.

But in lieu of those asked by his counsel gave the following:

"If the jury believe * * * that the defendant, * * * in sudden heat and passion, and not in his necessary or reasonably necessary self-defense, used such force and violence toward his wife as to cause her to leave his house from fear of death or great bodily harm at his hands, and from exposure to cold her death was produced by the said act of the defendant, they should find him guilty of manslaughter," etc.

"Forcing a person to do an act which causes his death renders the death the guilty deed of him who compelled the deceased to do the act. And it is not material whether the force be applied to the body or to the mind; but if it were the latter, it must be shown there was the apprehension of immediate violence, and well grounded from the circumstances by which the deceased was surrounded, and it need not appear that there was no other way of escape; but it must appear that the step was taken to avoid the threatened danger, and was such as a reasonable man might take." (Russ. on Crimes, 489; 3 Greenleaf on Evidence, section 142.)

In a case where the evidence was that the defendant, a husband, beat his wife and threatened to throw her out of the window and to murder her, and that by such threats she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and, of the beating and bruises received by the fall, died, it was held that if her death was occasioned partly by the blows and partly by the fall, yet if she was constrained by her husband's threats of

further violence, and from a well-grounded apprehension of his doing such further violence as would endanger her life, he was answerable for the consequences of the fall as much as if he had thrown her out of the window himself."

And in another case where the deceased, from a well-grounded apprehension of a further attack, which would have endangered his life, endeavored to escape, and in so doing was fatally injured from another cause, it was held murder. (Wharton on Homicide, section 374, where those and other cases are cited.) The case of *State v. Preslar*, 3 N. C. Reps., 421, was where, after the husband had desisted from beating his wife, she went off a little distance in the yard and sat down and the husband, after about five minutes, went into the house and laid upon the bed with his clothes on, and about half hour afterwards she started, in company of her son, to the house of her father, about two miles off. But when she got within two hundred yards of her father's house she said she did not wish to go there until morning, it being in the nighttime, and laid on a bed quilt in the woods. Early next morning she gave notice to the inmates of the house of her presence, but was not able to walk there, and the next day died.

In that case the court decided that as she had exposed herself thus without necessity, and there were, besides, circumstances showing deliberation in leaving her home, the husband could not be held responsible to the extent of forfeiting his life. But the court at the same time said that "if, to avoid the rage of a brutal husband, a wife is compelled to expose herself, by wading through a swamp or jumping into a river, the husband is responsible for the consequences."

The question before us is whether, tested by the principle stated and illustrated, the instruction quoted correctly and fully embodies the law applicable to this case.

It will be perceived that the jury were authorized by the instruction to convict if they believed the accused used such force and violence as to cause the deceased to leave the house,

from fear of death or great bodily harm at his hands. But they were not instructed, as they should have been, before convicting, to believe, nor permitted to inquire, whether or not such fear was well grounded or reasonable.

The jury might, and from their verdict doubtless did, believe she left the house from fear of death or great bodily harm, yet if they had taken into consideration the previous conduct of the deceased, her disposition and ability to fight with her husband, their comparative physical powers, and all the circumstances proved in the case, they might not have believed her fear was well grounded or reasonable, and unless it was the accused should not be held responsible for her death, for in such case he could not be regarded as forcing her to leave the house.

The jury should have been further instructed that to convict they must believe the death of the wife by freezing was the natural and probable consequence of leaving the house at the time and under the circumstances.

There is no evidence the accused prevented her re-entrance into the house, as assumed in the instruction in regard to murder, and it was error to make reference thereto.

For the errors indicated the judgment is reversed for a new trial and other proceedings consistent with this opinion.

R. L. Ewell for appellant.

RAWLINGS, &c. v. BIGGS.

(Filed February 22, 1887.)

1. Roads—Condemnation of land—Where, in a proceeding to open or alter a road a writ of *ad quod damnum* is awarded for the purpose of fixing the compensation for land over which it is proposed to run the road, the value fixed by the jury must prevail, the proceeding being regular, and while the court may refuse the application if it is of opinion that the value is too high, it can not fix a different value, or set aside the inquest for that reason.

2. Cost of opening road—The court, in determining whether the road shall be opened at the cost of the applicant or at the cost of the county, or what proportion of the cost each shall pay, is invested with a large discretion, and may look to the financial condition of the county as well as to the ability of

the applicant, and also to the benefits to be derived by others. The cost includes the sum to be paid the owner, as well as the officers' fees, and such other costs as pertain to the proceeding.

3. The proceedings in the circuit court in road cases are purely appellate, and that court must either affirm or reverse the case upon the evidence before the county court.

The county court in this case having refused to open the road, it was error for the circuit court to establish the road on condition that the applicant pay a greater sum than the jury awarded, and, thereafter to dismiss the appeal. The circuit court, if of opinion that the road should be established, will reverse the case, with directions to pay to the owners the compensation fixed by the jury, the amount to be paid by the applicant or by the county, or apportioned between them, as the county court may, in its discretion, adjudge.

Appeal from Greenup Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is an appeal from the judgment of the circuit court dismissing an appeal from a judgment of the county court refusing to establish a public road on the application of the appellant, and also an appeal from previous judgments rendered in the case that are final.

The statute provides that a writ of *ad quod damnum* shall be awarded if desired by the owner of the land, and a jury empanelled to fix the compensation for the land taken, additional fencing necessary and the damage to the residue beyond the peculiar benefits to the residue from the establishment of the road.

This provision of the statute is intended to apply when the owner or proprietor declines to accept the value fixed by the court, or when the owner, as a matter of right, demands the writ. This inquest as to the value is binding on all the parties, the county as well as the owner, and can not be assailed for the purpose of having another jury, except for some irregularity that would render the proceeding in the country erroneous. If the jury should fail to make the inquiry provided by the statute the proceedings would be liable to objection, or if the panel should be composed in part of those who were related to the parties, or was not a jury of freeholders, in such a state

of case the motion to set aside the verdict and have another jury impanelled should be entertained, but where the proceedings are regular and the statute complied with, the value and damages as fixed by the jury must prevail if the road is established. For this reason among others the power to pass on the question of damages by the court is denied, and the owner given the right that cannot be denied him of having a jury ascertain the damages.

“When the report, inquest and other evidence is heard the court shall determine whether or not the road shall be established.” (Section 11, chapter 94, General Statutes.) The value fixed upon the land may be too low, and, therefore, unjust to the owner of the land, or too high in the opinion of the court, and for that reason the application may be refused, but no investigation can be made by the court with a view of fixing a different estimate, or of setting aside the inquest and ordering another when there is no irregularity in the proceeding. The case is then finally heard and must be disposed of by either establishing the road or rejecting the application unless withdrawn by the applicant. If other proceedings are had they must begin de novo. When the case is heard the court, by virtue of the 17th section of the statute (General Statutes, page 763), may open the road at the cost of the applicant or require him to pay a part of the costs only, or the county may be required to pay all the costs. The costs include the sum to be paid the owner as well as the officers’ fees, and such other costs as pertain to the proceeding. The county judge is necessarily invested with a large discretion in the exercise of his judgment in such cases. He may look to the financial condition of his county, as well as the ability of the applicant to pay the damages, and the justice or injustice of requiring him to pay the cost when the opening of the road is as beneficial to others as to the party applying. The objection to this case is that the judge of the circuit court, to whom was submitted the law and the facts, has undertaken to pass on the question of damages and disregarded the verdict of the jury on the writ of ad quod

damnum. Each party has had his day in court on that question, and unless there was some provision in the statute for a trial de novo and the empanelling of another jury, the damages have been already ascertained.

The proceedings in the circuit court are purely appellate in this proceeding under the General Statutes, and the circuit court must either establish or decline to establish the road upon the evidence before the county court, and with this evidence is the verdict of the jury fixing the damages. He can not make the establishing of the road depend on the payment of a larger sum than that fixed by the jury. He must either affirm or reverse the case, and if the county court declines to open the road and the circuit court should be of a different opinion, he will reverse the case with directions to pay to the owners the compensation fixed by the jury, the amount to be paid in whole or in part by the applicant, or the whole by the county as the county court may, in its discretion, adjudge. For these reasons the judgment of the circuit court dismissing the appeal is reversed and also the judgment prior thereto establishing the road on condition that the applicant pay a greater sum in damages than the jury awarded. When the case returns, the viewers having reported and an inquest had, the circuit judge, upon the evidence, including the inquest and report, will proceed to affirm or reverse the judgment of the county court refusing to establish the road, and for proceedings consistent with this opinion.

B. F. Bennett for appellant.

E. F. Dulin for appllee.

TREACY v. ELIZABETHTOWN, LEXINGTON & BIG
SANDY R. R. CO

(Filed February 24, 1887.)

1. Railroads—Condemnation of land—As there is no element of a contract in a special remedy given to a railroad company to condemn land for its use the legislature has the power to repeal such a remedy and substitute new remedies in its stead.

2. Same—Repeal of statutes—The general law of April 11, 1882, prescribing the mode of condemning land for the use of railroad companies, repealed the provisions of appellee's charter upon the same subject, being inconsistent therewith.

3. Same—The general law applies to the trial in the circuit court of proceedings for the condemnation of land which were begun prior to its passage, provided the railroad company had not, prior to the passage of the law, acquired title to the land by a compliance with the conditions precedent to its right to condemn the land under its charter, and thus left nothing to be determined but the amount of damages.

In 1880 appellee instituted a proceeding to condemn land belonging to appellant, and in February, 1880, the jury's inquest of damages was returned to and confirmed by the circuit court. This court, upon appeal, reversed the judgment of confirmation upon the ground that appellee had not shown that the taking was for a public use, and that the land was necessary for that use, which were held to be conditions precedent to its right to condemn the land. Upon the return of the case the circuit court, in 1884, again confirmed the inquest. Held—That the case should have been tried *de novo*, as provided by the general law of April, 1882, and not tried in accordance with the provisions of appellee's charter.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Bennett.

This is the second time this proceeding has been in this court. (80 Ky., 259.)

Under the 13th and 14th sections of the appellee's charter (Acts 1869, volume 1, pages 222-3) a justice of the peace, upon the application of the appellee, was authorized to issue a writ of "ad quod damnum," and the sheriff, by virtue of the writ, was authorized to empanel a jury in the county to find for the owners the value of the land that the appellee "wanted" for the purpose of constructing its road; also to assess the damages incidentally resulting to other land of the owners.

The jury's verdict was to be in writing and returned to the office of the circuit clerk, to be either confirmed or set aside by the circuit court. If the verdict was confirmed it was to be recorded, but if set aside a new inquisition was ordered, which was to be held by the sheriff in the same manner as the first. Immediately after the return of the first verdict, and whether the same was set aside and a new jury ordered or not, the

appellee, had the right to enter upon the land and construct its road, and upon payment, or tender of payment, of the amount assessed the appellee was clothed with the actual title to the property.

The legislature of Kentucky passed a general act, which was approved April 11, 1882, prescribing the mode of condemning land for the use of railroad and turnpike companies.

The act provides, in substance, that any railroad company authorized to construct and operate a railroad in this State, and being unable to contract with the owner of any land necessary for its use for the purchase thereof, may apply to the county court to appoint commissioners to assess the damages the owner of the land may be entitled to receive; and thereupon it shall be the duty of the county court to appoint three commissioners to act in the premises; that the commission shall view the land and award to its owner the value; that they shall return their award in writing to the county court clerk's office; that upon the application of the company, in the manner indicated in the act, the clerk shall issue process against the owner of the land, citing him to show cause why the award should not be affirmed. And at the next regular term of court, after the owner shall have been summoned the length of time required, it shall be the duty of the court to examine the report and confirm it, if it shall appear to be in conformity to the act, provided no exceptions to the report are filed. If exceptions are filed by either party, then the court shall empanel a jury to try the issue of fact made by the exceptions. If sufficient cause be not shown for setting aside the verdict the court shall enter judgment in accordance with it. Either party may appeal to the circuit court of the county, and the appeal shall be tried "de novo." The act also repeals all acts and parts of acts in conflict with it.

This court, in the case of *Chattaroi Railway Company v. Kinner*, 81 Ky., 223, decided that the act *supra* repealed all former acts, whether general or special, which were in conflict with it. And as there is no element of a contract in a special

remedy given to a railroad company to condemn land for its use the legislature has the power to repeal it and substitute new remedies in its stead.

The 13th and 14th sections of appellee's charter, as well as the amendments thereto, which prescribed the mode of condemning land for its use, were repealed by the general act of the legislature, approved April 11, 1882.

The appellee, in 1880, attempted to have condemned for its use fifty feet off the rear end of a lot of land owned by appellant, in the city of Lexington, upon which he was erecting a valuable and expensive livery stable, which was nearly completed at the time.

The jury's "inquest of damages" was returned to the circuit court in February, 1880, and the circuit court, at its February term, 1880, confirmed the inquest. The appellant, Treacy, appealed from the judgment of confirmation to this court. This court, in May, 1882, reversed the judgment of the lower court, and remanded the case for further proceedings consistent with the opinion.

After the return of the case to the lower court it, at its special January term, 1884, heard the proof relative to the use for which the land was sought to be condemned, and the necessity for condemning it to that use, and damages the appellant sustained by reason of its condemnation to the use of the appellee, and, thereupon, again confirmed the inquest of the jury in the country.

From that judgment appellant again appeals to this court. He contends that the appellee's charter, relative to the mode of condemning land for its use, having been repealed by the act of 1882, the case, upon its return to the circuit court, should have been heard and tried *de novo* in accordance with the provisions of the act of 1882, and not in accordance with the provisions of appellee's charter.

It is certain that the lower court retried the case in accordance with the appellee's charter. If the court was right in this, then the judgment must be affirmed. [If the court.

was wrong, and should have retried the case "de novo," as provided in the act of 1882, then the judgment must be reversed.

Sections 13 and 14 of appellee's charter, as well as the amendments thereto, which prescribed the mode of condemning land and other property for appellee's use, are in conflict with the provisions of the act of 1882, and were, therefore, repealed by the 9th section of that act.

If, therefore, the appellee's proceedings in the country were a sufficient compliance with the conditions precedent to its right to acquire right or title to the land, then the lower court should have retried the case under the provisions of the charter, because, in such a case, the appellee, having actually acquired a right to the property by virtue of its charter remedies, the legislature could not, by a subsequent act, repeal the charter remedy so as to change or affect the appellee's vested rights thereunder.

On the other hand, if the appellee failed to comply with the conditions precedent to its right to acquire right or title to the land, then the court should have proceeded to retry the case de novo under the act of 1882, because the appellee, having acquired no vested right to the land or any interest therein by its proceeding, the repeal of the charter remedy left appellee without a right to proceed further under its charter. And it could only complete its right to condemn the land by conforming its proceedings to the provisions of the repealing act.

This court, upon the former appeal in this case (80 Ky., 266), decided that the appellee's right to take the land depended upon two conditions: First, that the taking was for a public use; and, second, that the land was necessary for that use. That these conditions were precedent to the right of the appellee to take the land, and that it devolved upon the appellee to show affirmatively the existence of these conditions before the land could be legally condemned to its use. And the appellee having failed to show the existence of these precedent conditions, the case was reversed and remanded for proceedings consistent with the opinion.

If the appellee had complied with the conditions precedent to his right to have the land condemned, and the case had been reversed simply because the jury misapprehended the merits of it, then the reversal could not, under the charter, have affected any title or title right that the appellee acquired to the property by reason of the first inquest of the jury and the tender of the sum awarded as damages to the owner.

But the reversal was not because of the mere misapprehension of the jury as to the proper measure of damages. On the contrary, the reversal was based upon grounds which went beyond that question, and which developed the fact that the appellee had not complied with the conditions precedent to its right to have the land condemned to its use. The establishment of these conditions was an indispensable prerequisite to a legal condemnation of the land. And the failure of the appellee to manifest its right to have the land condemned to its use, by establishing these indispensable precedent conditions, was fatal to its proceeding to condemn the land. And the case having been reversed for these expressed reasons, the inquest of damages by the jury was also necessarily reversed by implication.

Therefore, when the case again came up in the circuit court for trial it stood, in legal contemplation, upon the appellee's application or petition alone; and such being the status of the case, should the court have tried it under the law of 1882?

In the case of *S. & I., S. E. R. W. Co. v. Hall*, 67 Ill. Reports, the court said: "This was a proceeding to condemn a right of way commenced under the act of 1852. Before the trial in the circuit court the act of 1872 had taken effect, and the damages were assessed under the rule prescribed in that act. This was unquestionably right. The later act expressly repealed all conflicting provisions in the former, and where proceedings of this character were in fieri, it would necessarily follow that they must be completed under the new law. The State has the right to say on what terms it will allow its right of eminent domain to be exercised so long as any thing remains

to be done by the corporation in order to complete the condemnation of the land." This court, in *Chattaroi Railway Co. v. Kinner*, 81 Ky., 223, says: "But the legislature has the power to enact any subsequent or amendatory law which regulates the remedy for enforcing corporate rights and privileges, so it does not, under the guise of regulating the remedy, impair the obligation of a contract, or which only operates on the relations between the corporation and other persons before any contract between them has been concluded, and interferes with no vested rights of the corporation."

As before said, as the appellee failed to establish the conditions precedent to its right to condemn the land, it acquired no title to the land or any interest therein by the jury's inquest of damages and the tender of the sum assessed to the appellant.

Therefore, the circuit court should have proceeded to try the case de novo, and upon the request of either party a jury should have been empannelled to try the case.

The judgment is reversed and the case is remanded, with directions to proceed consistently with this opinion.

Wm. Lindsay, D. G. Falconer and Jas. H. Mulligan for appellant.

Breckinridge & Shelby for appellee.

SHELBY'S ADM'R v. CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. R. CO.

(Filed February 19, 1887.)

1. Railroads—Negligence—It is the duty of the engineer in charge of a train moving, or about to move, to give timely warning of its approach to a crossing or other place where the public have a right to go. And it is no less his duty to use all necessary means consistent with the safety of those on the train to prevent injury to a person on the track in front of a train after his peril is discovered; and this duty the company owes even to a trespasser on its track.

2. Same—A detached car having been set in rapid motion on a down grade, it was as much the duty of some servant of the company to be in a position to give warning of its approach, and to control its movements, as if it had been attached to a train or an engine.

3. Same—Increased vigilance and precaution to prevent injury is required of those in charge of trains moving in or through a city or town.

4. Same—The fact that pedestrians, by license or custom, travel upon a railroad track at a particular place makes it the duty of the servants of the company to exercise greater caution and prudence in the operation of its road at that place, whatever may be the extent of duty which the company owes to such persons; and neither a train nor a single car should be moved at such a place without some servant in a position to give warning of its approach and control its movement.

5. Same—One who was upon a side track seeking employment from a shipper of stock, to feed and water his stock, was there upon business indirectly connected with the operation of the road, and having a right to be there, the company owed him a duty of active vigilance.

6. Peremptory instruction—As the evidence introduced by the plaintiff made out a *prima facie* case it was error to give a peremptory instruction to find for defendant.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Lewis.

This is an action by appellant to recover for the destruction of the life of his intestate, George Shelby, a boy about nine years of age, by the alleged wilful negligence of the servants and agents of the appellee. And the question before us is whether the lower court erred in giving, at the conclusion of the plaintiff's evidence, a peremptory instruction to find for the defendant.

The intestate was killed by being run over by a box car on a side track of appellee's railroad, at Junction City, Boyle county, where the Louisville & Knoxville road, running east and west, crosses it.

It appears that on the occasion those in charge of a freight train standing on the main track of appellee's road were endeavoring to detach the box car in question, which was next to the engine, for the purpose of placing it on the side track near the depot, and with that view it was drawn along the main track to the intersection, and thence pushed upon the side track. But instead of keeping it attached to the engine until it reached the place where it was the purpose to leave it, the engine, after being made to give it an impetus,

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was cut loose at a point about seventy-five yards from where the intestate was standing, and carried back in the opposite direction towards the main track, while the box car was permitted to move, without the control of any one, along the side track, that was down grade, at the rate of from five to eight miles an hour, going a distance of two hundred yards, after running over the intestate, before it stopped.

No signal or warning was given of the approach of the car to where the intestate was killed, nor does it appear that any servant of appellee was in a position to see or warn him or any one else who might have been on the side track in front of the moving car, which the evidence shows did not itself make enough noise to attract attention.

It appears that Junction City contains a population of about four hundred, and about twenty families reside south of the Louisville & Knoxville road, who have been accustomed to pass along the side track of appellee's road going to the part of the town north of the other road.

It further appears that a few hours before his death the intestate had been employed by the owner to water hogs in a box car of another freight train, and his purpose in going where he was when killed was to solicit employment by the same person in watering cattle in a car of the train from which the box car in question was detached, and when struck he was standing on the side track, opposite the cattle car, waiting for the owner, who was at it, to become disengaged.

The right to maintain an action against a railroad company for an injury to the person always involves a breach of duty by the company or its servants, and its liability generally depends upon the place where, and the circumstances under which, the injury is done, and the situation and relation of the parties at the time.

But there are certain well-established rules which regard for human life will not allow to be relaxed.

It is the duty of the engineer in charge of a train moving, or about to move; to give timely warning of its approach to a

crossing or other place where the public have a right to go. And it is no less his duty to use all necessary means consistent with the safety of those on the train to prevent injury to a person on the track in front of a train after his peril is discovered. And this duty the company owes even to a trespasser on its track. For while, as a general rule, he is required to use his eyes and ears to discover the approach of trains, he may nevertheless recover for an injury wantonly or intentionally inflicted on him.

And increased vigilance and precaution to prevent injury is required of those in charge of trains moving in or through a city or town. But it is obvious that neither the duty of giving the warning of the approach of trains, nor of resorting to the proper and necessary means to prevent collision with persons, can be performed unless there be some one in a position to see ahead of the train and to control it.

Though in this case the injury was done, not by a train drawn or moved by the engine, but by a single detached car, nevertheless it seems to us that it was as much the duty of some servant of appellee to be in a position to give warning of its approach, and to control its movements, as if it had been attached to a train, for its movement on the down grade was not only rapid but without noise sufficient to attract attention.

As held by this court in *Kentucky Central R. R. Co. v. Gastineau*, decided June, 1885 (7 Ky. Law Rep., 3), a railroad company is not required to anticipate the peril of a person who intrudes into its private yard, and undoubtedly a company may, without a breach of its duty to the public, move a single detached car, by bumping or pushing, or suffer it to move by gravitation, to a desired position on that part of its track at a depot or station where the public have no right to go. But in this case the car was allowed to move, without control, at a rapid rate of speed, a distance of near three hundred yards in a town, and along a considerable portion of the track where it ran, persons were in the habit of passing by the tacit permission, if not express license, of the company.

There is some conflict of authority as to the extent of duty which a railroad company owes to pedestrians who, by license or custom, use its track to travel on. But unquestionably such fact should enhance the duty of the servants of the company to exercise caution and prudence in the operation of its road at such place. (Thompson on negligence, volume 1, page 453.) And, in our opinion, the full performance of duty requires that neither a train nor single car should be moved at such place without some servant is in a position to give warning of its approach and control its movement.

The intestate, however, was not, at the time he was killed, using the track for travel from one part of the town to the other. But he was then upon business legitimately connected, at least indirectly, with the operation of the road, the performance of which the company must be presumed to assent to, for in transporting animals on a railroad it is necessary and customary for the owners to employ others than the servants of the company to feed and water them at stations and stopping places. He had, sometime before his death, been so employed, and at the time of his death was seeking the same employment.

In our opinion, therefore, he had a lawful right to go upon the track at that place, and the company owed to him a duty of active vigilance.

It is true he was upon the side track, near the rail next to the main track, and might have taken a safe position between the tracks while waiting to speak to the owner of the cattle. But when he went there the side track was open, and no notice or warning was given that the box car was about to be put upon the side track, the first notice given to him being when the car struck him.

In our opinion the evidence introduced by the plaintiff made out a prima facie case, and the court erred in giving the peremptory instruction.

Wherefore, the judgment is reversed and cause remanded for a new trial consistent with this opinion.

Robert Harding, J. B. McFerran and Vanwinkle & Rodes for appellant.

Durham & Jacobs for appellee.

MAYSVILLE & MT. STERLING TURNPIKE ROAD CO.
v. RATLIFF.

(Filed February 22, 1887.)

1. Injunction—Tollgates—To entitle an individual to an injunction restraining a turnpike company from erecting a tollgate at a particular place it must appear that the gate would be a public nuisance, and in addition that the plaintiff would suffer a special injury distinct from that suffered by the public.

2. Same—A turnpike company has the right to place its gates so as to most effectually and certainly collect what it is legally entitled to, in so far as it is not restricted by its charter, and to that end may also change any gate after it is once established.

3. Same—A turnpike company may, unless its charter otherwise provides, erect gates at a less distance apart than five miles, though the toll must be proportioned according to distance.

4. Same—A turnpike company may, without rendering itself liable for obstructing the highway, erect a tollgate and a tollhouse upon its right of way, provided it leaves the portion of the road covered with stone free for travel.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Lewis.

Appellant, being the owner of a turnpike road extending from Maysville through Sharpsburg to Mt. Sterling, and entitled by its charter to collect tolls thereon, had, for many years, a tollgate, designated No. 8, at a point on its road about two miles north of Sharpsburg. But having commenced the erection of another gate at a point nearer to, but more than a mile from, Sharpsburg, with the avowed purpose of collecting tolls there and abandoning gate No. 8, appellee brought this action and obtained an injunction restraining it from erecting and maintaining a gate or collecting tolls at any place on its road adjoining or opposite appellee's farm, between No. 8 and a point one mile north of Sharpsburg. And by the judgment appealed from that injunction was perpetuated.

It is contended for appellee that the injunction is proper because appellant was endeavoring to perform an illegal act, which inflicted special injury to appellee aside from the general public, and the erection of the tollgate on appellant's road obstructed the public highway, and created a public nuisance peculiarly damaging to appellee.

To maintain this action it must appear that the erection of a tollgate between No. 8 and a point one mile north of Sharpsburg would be a public nuisance, and in addition that appellee would suffer a special injury distinct from that suffered by the public. (Cosby v. Owensboro & R. Railroad Co., 10 Bush, 291.)

But a tollgate is not per se a nuisance, and before the one appellant proposes to erect can be so considered it must appear to be an unlawful obstruction of the turnpike road as a public highway, for if the erection of the gate at the place and for the purpose proposed is warranted by law it is not a public nuisance, nor would the special injury complained of by appellee, even if it existed, avail in this action.

It appears that the western line of his land begins at a stake twenty-five feet east of the center of the road, and between the new gate and Sharpsburg, running thence northward along the east side of the road eighty poles to a stake between the new and gate No. 8, and that the present way from his dwelling house intersects the turnpike also between the two gates, so that the erection of the new gate will compel him either to pay toll in going to Sharpsburg, which he has not heretofore done, or else to make a new way from his dwelling house to the turnpike between the new gate and Sharpsburg.

We have thus the complaint urged as one of the causes of action, and attempted to be sustained by proof, that the erection of the new gate will compel appellee to undergo the expense of making a new way by which to avoid paying for the use of appellant's road. We are unable to see how the erection of the new gate will in any way infringe appellee's rights or inflict upon him any civil injury, for to the extent he uses the road he ought to pay.

Nor has he any right of action for a possible and indeterminate injury that may result from the proximity of the new gate to his land. For the same ground might be relied on by every other person owning land adjacent to a turnpike road, and thus prevent the change of any tollgate, however urgent or proper such change might be.

Gate No. 8 is situated opposite the grounds of the Bath County Fair and Trotting Association, to which there is an entrance from each side of the tollgate, whereby the large number of persons attending the annual meetings are enabled to avoid the payment of toll, though having the use and benefit of appellant's road for four or five miles each way; and it seems the principal object in erecting the new gate is to compel those at least coming from the direction of Sharpsburg to the fair grounds to pay toll.

Under its charter appellant has the right to demand toll of all those traveling on its road in vehicles or on horseback; but no toll can be collected except at a gate. It would, therefore, seem manifest that the company should have the election to place their gates so as to most effectually and certainly collect what they are legally entitled to, for not only do those who purposely evade the payment of toll by going around the gates deprive the company of what they justly owe it, but lessen the ability of the company to keep its road in proper repair, in which the public is interested, and upon which the existence of the franchise depends.

To say that a tollgate once established shall never be changed, whatever may be the improvement and change in the country where the road is located, or however necessary it may be in order to enable the company to collect toll from those who use its road, is unreasonable and unjust, because the object of a change when made is to more surely collect tolls from all who use the road, and of that no one has the right to complain.

By section 5 of the charter appellant has the right to acquire land upon which to erect tollgates and houses for gatekeepers.

But no power is given to acquire land for that purpose except by purchase, though the power is conferred to have sufficient land, stone and gravel condemned for the construction and repair of the road. Nor does appellant now seek any land for such purpose; but is proceeding to erect the gate entirely upon the land of the company. And the only question about which, it seems to us, there is any room for argument is whether the tollgate can be erected in the manner proposed without being an obstruction.

By the original charter the company was authorized to acquire land for its road sixty feet wide, thirty of which was to be graded and eighteen feet macademized. But by amendments to the charter it was authorized to reduce the width to forty-five feet, of which twenty-four feet is for the grade and sixteen feet for stone. Though whether the change has ever been made does not appear.

It seems to us the legislature evidently intended to authorize the company to erect gates within the limits prescribed, otherwise it would have been without authority to erect gates at all. Moreover, the gate and tollhouse must of necessity be within that boundary for the convenience of the public, as well as to prevent persons from passing through without paying toll.

In our opinion the company has the right to erect the new gate upon its own right of way, so as to leave the portion covered with stone free for travel, without rendering itself liable for obstructing the highway.

It seems the site of the proposed new gate is less than five miles of the one south of Sharpsburg, in the direction of Mt. Sterling. But there is more than the distance of ten miles between the new gate and the second one towards Mt. Sterling.

By the charter the company was authorized to erect a gate upon the completion of five miles, with the proviso that no one should be erected nearer than one mile from any town on said road.

There is no provision requiring the gates to be precisely five miles apart, nor would it be practicable on any road.

Whatever doubt there may be as to the meaning of the char-

ter on this subject is removed by subsection 1, section 8, chapter 110, General Statutes, which authorizes gates to be at a less distance apart than five miles, though the toll must be always proportioned according to distance.

In our opinion appellant has the legal right to change the location of gate No. 8 to any point on its road between that place and Sharpsburg, not nearer than one mile of that town, and may erect gates upon its own land, provided the part of the road used for travel is not obstructed.

Wherefore, the judgment is reversed and cause remanded, with directions to dissolve the injunction and dismiss the petition.

Judge Holt not sitting.

J. S. Hurt, W. R. Patterson and C. W. Goodpaster for appellant.

H. L. Stone for appellee.

SOAPER v. HOWARD, &c.

(Filed February 24, 1887.)

An execution creditor is not deprived of his lien on the debtor's land by the failure of the clerk to record the sheriff's return as required by the act of March 8, 1878, where the execution has issued from another county than that where the land lies, or, as required by the General Statutes, where it has issued from the same county.

An execution was issued to Daviess county upon a judgment of the Henderson Circuit Court, and there levied on land subject to a mortgage. At the sale the plaintiff became the purchaser. Between the date of the levy and the sale thereunder the defendant sold the land to appellees. The plaintiff, the purchaser at the execution sale, brought this action to remove the encumbrance by reason of the sale and conveyance to appellees. This right was denied him upon the ground that his lien was lost by the failure of the clerk of the Daviess Circuit Court to record the sheriff's return upon the execution, as required by the act of March 8, 1878. Held—That the lien is not lost by the failure of the clerk to discharge his duty, as the statute does not so provide.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant recovered a judgment in the Henderson Cir-

cuit Court against T. Y. Howard, and had an execution issued to the county of Henderson that was returned no property found.

Howard owning an undivided interest in a tract of land in the county of Daviess, the appellant had an execution issued to that county, and placed it in the hands of the jailer, who levied it on the land subject to a mortgage held by one Hitchells, and having advertised it for sale, the plaintiff in the execution, Soaper, became the purchaser.

Between the date of the levy and the sale of the land under the execution the owner, who was the debtor, sold the land to his co-appellees. The appellant then brought this suit to enforce his lien, and to remove the encumbrance by reason of the sale and conveyance to the appellees. This right was denied him, and his petition dismissed.

By an act of the legislature approved March 8, 1878, it is provided "that where executions of fieri facias are, or shall be, issued from the courts of any county in this Commonwealth, and the same are sent to another county, and shall be, by the sheriff of such county, levied upon land in such county, it shall be the duty of the sheriff so levying said execution to return the same to the clerk of the circuit court in his county, who shall record the same as executions are now required to be recorded, and after recording same, such clerk shall deliver said execution back to the sheriff, who shall return the same to the office of the court whence it issued."

It seems that this statute was not complied with by the officer, but the execution was returned to the Henderson circuit clerk's office, and the sale made without any evidence of the levy upon record in the county of Daviess where the land is.

It was insisted in the court below, and so adjudged, that the failure of the sheriff to comply with this statute deprived the appellant of his lien, and this is the question presented in the case. It will be seen from the wording of this statute that no mention is made of the lien in behalf of the plaintiff in the execution that exists not only by reason of the levy, but while the execution is in the officer's hands, but a duty is only im-

posed on the sheriff and clerk of recording the levy in the county where the land is levied on.

This duty is required to preserve the evidence of what has been done under the execution, and for the convenience of those who may be investigating the title to land with a view of purchasing, but the lien nevertheless exists, as there is nothing in the statute depriving the execution creditor of his right to enforce it. The execution in a case like this is required to be recorded by the clerk when handed him by the sheriff in the same manner as he is required by law to record such levies on executions issued from his own office. This is the express language of the act. The clerk, by section 4 of article 1, chapter 16, General Statutes, is required to keep in his office a book in which he shall record every execution, and the return of the sheriff thereon, the same to be in full whenever it shall appear by said return that any real estate, or any interest therein, hath been by virtue thereof. This statute, as well as the one under consideration, was intended to preserve the evidence of such official action by the sheriff, and to extend protection as far as it applied to those purchasing the land, but it is nowhere provided that if the record is not made the lien shall be lost, or that the failure of this duty on the part of the official shall deprive him of the lien.

Liens existing by statute may be made conditional by statute, that is, provided the instrument creating the lien is recorded within a certain time, but the court will scarcely deprive one of a lien given him by statute upon a construction by mere implication as to the legislative intent. Besides, if the lien is released in this case by reason of the statute, why is not the lien released where the land is sold under execution from the same county in which it is located? It is made the duty of the clerk in each instance to record the levy. It may be argued that in the case before us the purchaser would have no means of ascertaining the existence of the lien without going to the county of Henderson, and, therefore, should be treated as an innocent purchaser. Such may be the condition on which the purchase is placed, but with the execution in

the hands of the sheriff the lien would exist even before the levy, although issued from another county, and that lien must continue if there is no other reason for disregarding it, although the sheriff may fail to have it recorded as required by the statute. The continuance of the lien is not made to depend on the discharge of this official duty. Such liens are created as against subsequent purchasers by reason of the statute, and the courts have only to enforce them. It was never intended that the execution creditor should be deprived of his lien by failure of the clerk to record the levy under either statute.

The judgment below is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

H. M. Haskins and James Stuart for appellant.

W. T. Ellis for appellee.

VALLANDINGHAM v. JOHNSON.

(Filed February 26, 1887.)

1. The deed of an infant is not void, but voidable only.

2. A voidable act of an infant may be avoided by an act of equally as solemn a nature. Therefore, a conveyance of real estate executed by an infant may be disaffirmed by the grantor after he becomes of age by a conveyance of the same premises to a third person: and it is not necessary, in order to make the subsequent conveyance effectual, that the grantor should place the first purchaser in statu quo.

H., an infant, sold land to J. by title bond, and subsequently, while still an infant, sold out and conveyed the same land to V. Immediately after he became of age he conveyed the land to J., as he had contracted by his title bond to do. Held—That the conveyance to J. was a disaffirmance of the conveyance to V.

3. A title bond is not a recordable instrument, and the recording of it does not operate as constructive notice.

4. Action to quiet title—One who claimed an undivided interest in a tract of land brought this action to quiet his title. Both he and the defendant owned other interests, each claiming the superior title to the interest in contest, the defendant being in possession of the land. Held—That as they were joint owners, the possession of one was the possession of both, and the defendant's possession being that of plaintiff, the action may be maintained.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Holt.

N. H. Horn sold to the appellee, Johnson, on October 14, 1881, by title bond, his undivided interest in a tract of land. He was then an infant. The bond recited that he would become of age in December, 1882, and that he would then convey by deed. The vendee had the bond recorded in the county where the land lies, but the record of it was destroyed by fire in May, 1882. It was, however, not a recordable instrument; and could not, therefore, operate to give constructive notice of the purchase to third parties.

On January 3, 1883, Horn, for value, conveyed the same landed interest to the appellant, Vallandingham, and the deed was recorded in the proper office. It is evident that both vendees purchased in good faith. It is equally, if not more plainly, evident that the same can not be said of Horn. No regard for even common honesty actuated him in the transaction.

There are some circumstances in the case which tend to create the belief that he became of age on December 19, 1882; but viewed by the light of the entire testimony the conclusion is inevitable that this is not so; and that he did not reach his majority until December 19, 1883. He was, therefore, an infant when he executed the deed to Vallandingham.

On December 20, 1883, and which was the next day after he became of age, he, in conformity to his title bond, executed a deed, which was properly recorded, to his brother-in-law, the appellee, Johnson.

The latter brought this action to quiet his title to the N. H. Horn interest, and have it declared superior to that of Vallandingham.

Each of them owned other interests in the tract of land; and each, from the time of his purchase from Horn, claimed the interest in contest. They were joint tenants or owners; and the possession of one was that of both.

It is urged, as is true, that an infant is not privileged to commit a fraud; and that Horn induced the appellant, Vallandingham, to purchase by representing to him that he was

of age. The testimony is conflicting upon this point; but conceding that it so establishes, yet this is a contest between two innocent purchasers, and not between one of them and Horn.

The validity of the deed to Vallandingham is the main question, therefore, to be considered.

Much diversity of opinion has existed as to whether the deed of an infant is void or voidable at common law. Some have held that it depended upon whether there was a semblance of benefit to him or not: that if it necessarily operated to his prejudice, then it was void; but if it might result in benefit to him, then it was merely voidable. In the leading case of *Zouch v. Parsons*, 3 Burr., 1804, Lord Mansfield said that the true ground upon which an infant's deed is voidable only was not settled, some holding that it depended upon the solemnity of the instrument, and its delivery by the infant himself, and others upon the semblance of benefit to him appearing upon its face.

The decisions upon the question, both English and American, are numerous; but the Supreme Court of the United States, in the case of *Tucker, &c. v. Moreland*, 10 Peters, 58, said:

"The result of the American decisions has been correctly stated by Mr. Chancellor Kent, in his learned commentaries (2 Com. Lect., 31) to be that they are in favor of construing the acts and contracts of infants generally to be voidable only, and not void, and subject to their election, when they become of age, either to affirm or disallow them; and that the doctrine of *Zouch v. Parsons* has been recognized and adopted as law. It may be added that they seem generally to hold that the deed of an infant conveying land is voidable only, and not void, unless perhaps the deed should manifestly appear on the face of it to be to the prejudice of the infant, and this upon the nature and solemnity as well as the operation of the instrument."

The deed to Vallandingham was voidable only; and the question arises whether it has been avoided by Horn. If so, it was by the deed to Johnson. An infant may avoid his act or contract in various ways, depending upon the nature of the trans-

action and the circumstances of the case. If the act be a matter in pais it may be avoided by an act in pais of equal notoriety. Certainly if the act of avoidance be of as solemn a nature as that to be avoided, it will be effectual. It need not always be of as high a nature, because a deed may be avoided by a plea, but if the act of disaffirmance be as high and solemn, then it can not be impeached as insufficient. Under the old mode of conveying, if the infant had given livery of seisin, there must be a re-entry by him, with an expression of his dissent, because the act of avoidance, in order to disaffirm the first act, had to be of equal notoriety. The rule as to a feoffment, however, does not apply to a conveyance by bargain and sale. There is no reason why it should. Both principle and authority dictate that the infant should be allowed to manifest his dissent in the same manner as he first assented to convey.

The early cases of *Jackson v. Carpenter*, 11 John., 539, and *Jackson v. Burchin*, 14 John., 124, announced this doctrine, and were followed by our Supreme Court in *Tucker, &c. v. Moreland*, *supra*.

The reason which required an entry to avoid a feoffment supports the rule that it is not necessary where the conveyance is by deed.

The one was an alienation in pais; the entry upon the land attended by certain formalities transferred the right. Hence a re-entry was necessary with an expression of dissent to divest the livery of seisin, else the avoidance was not shown by an act of equal notoriety or solemnity. One deed of bargain and sale is, however, equally notorious and solemn with another; and there is no reason why an infant should be required to do more by way of disaffirmance than was necessary upon his part at the outset to manifest his assent to the conveyance.

The present rule follows out the reason in the case of a feoffment, which required a re-entry for the purpose of notoriety.

A review of all the cases at hand shows that the rule, that a subsequent conveyance by an infant amounts to a disaffirmance, is well settled. *Tyler on Infancy and Coverture*, section

1, says: "The infant may also disaffirm his conveyance of real estate by a reconveyance of the same premises to a third person." (Also the cases of *Youse v. Norcoms*, 51 Amer. Dec., 175; *Peterson v. Laik*, 25 Mo., 544; *Cresinger v. Welch*, 15 Ohio, 156.)

In the case now in hand the conveyance to Johnson, made without delay after Horn became of age, was of equal solemnity with that to Vallandingham, and was a disaffirmance of it.

Nor was it necessary, in order that it might be effective, that the infants, should place the other party in statu quo by returning to Vallandingham what he had received from him. Morality and common honesty should prompt him to do so; but this controversy is between two innocent purchasers, whose equities are at least equal, if indeed that of Johnson, by reason of the priority of his purchase, is not superior.

Judgment affirmed.

Wm. Lindsay and Rodes & Settle for appellant.

I. H. Goodnight and Edward W. Hines for appellee.

YANKEY, &c. v. SWEENEY, &c.

SWEENEY v. MONTGOMERY, &c.

MONTGOMERY, &c. v. SWEENEY.

MONTGOMERY v. TURNEY'S ADM'R.

(Filed January 18, 1887.)

Appeals from Washington Circuit Court.

Opinions of the court by Judge Bennett.

YANKEE, &c. v. SWEENEY, &c.

1. A judgment dismissing an action will not bar another suit founded on the same cause of action if the first suit was dismissed because the court had not jurisdiction to hear it upon its merits.

The dismissal of an action to set aside a fraudulent conveyance does not bar another action for the same purpose, the first suit having been dismissed because the plaintiff had not obtained a return of "no property."

2. In an action to set aside a conveyance as constructively fraudulent the fact that the grantor had other property subject to execution sufficient to pay the plaintiff's debt upon which the plaintiff refused to have his execution levied, in order that he might subject the property fraudulently conveyed, and thus deprived the grantee's husband of his marital rights, is not a valid defense, as a voluntary conveyance passes to the grantee no title whatever as against the existing liabilities of the grantor.

3. Curtesy—While as a general rule the husband is required to take actual possession of the wife's land as a condition precedent to his right of curtesy therein, the reason of the rule is complied with, and the husband is entitled to curtesy, if any person at the death of the wife is seized of her land for her use.

A father conveyed land to his daughter, but held and possessed the land thereafter until her death, she and her husband living with him. Held—That the father's holding must be construed as for the use of the daughter, and her husband is entitled to curtesy.

4. Same—Conveyance in consideration of support—A father conveyed land to his daughter in consideration of love and affection, and the additional consideration of the grantee's undertaking to support the grantor and his wife during their natural lives, a lien being retained in the deed as a security or indemnity for the support of the grantor and his wife. The grantee died, her husband and the grantor surviving. In this action by the husband to recover the lands of the grantor, upon the ground that he is entitled to curtesy, it appears that the plaintiff and the defendant are unfriendly, and that this estrangement will probably continue.

Held—That the defendant is entitled not only to the exclusive use and control of the land during his life, but is entitled also to have so much of the land itself as may be necessary for his reasonably comfortable support during life applied to that purpose.

The appellants are husband and wife. The appellee, William Sweeney, on the 14th day of February, was appointed and qualified as guardian of the appellee, Sallie Yankey, then Sallie Teter, by the Washington County Court.

The appellants instituted suit in the Washington Circuit Court against the appellee, William Sweeney, and his surety on his guardian's bond, by which they sought to recover the amount shown to be due the appellant, Sallie, by the appellee's final settlement as her guardian with the Washington County Court. And at the March term, 1881, of the Washington Circuit Court they recovered judgment against the appellee as such guardian, on his settlement, and his surety for the sum of \$520.41, with interest thereon at the rate of 6 per cent. per annum, from the 16th day of February, 1880, until paid, and \$24.55 costs.

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Execution was issued on this judgment and placed in the hands of the sheriff of Washington county on the 8d of August, 1881, which was, on the 11th of August, 1881, returned by the sheriff, and endorsed by him "no property found to make this fi. fa. or any part thereof."

On the 25th day of January, 1878, the appellee, William Sweeney, by deed conveyed to his daughter, Lucy D. Montgomery, wife of the appellee, M. D. Montgomery, a tract of land, lying and being in Washington county, containing sixty-four acres. The consideration for the conveyance is expressed in the deed as one dollar not paid, and natural love and affection.

The appellee, William Sweeney, owned this land at the time he was appointed and qualified as the guardian of the appellant, Sallie.

The appellants, on the 12th day of August, 1881, instituted this action in equity in the Washington Circuit Court against the appellees, William Sweeney and M. D. Montgomery, husband of Lucy D. Montgomery, she having died since the making of said deed, and Rosa D. Montgomery, an infant and only child of M. D. and Lucy D. Montgomery, on said return of no property found, and sought to subject said tract of land to the payment of said judgment and costs upon the ground that the appellee, William Sweeney, as guardian of the appellant, Sallie Yankey, was liable to her in the full sum for which the appellants obtained judgment at the time he conveyed the land to his daughter, Lucy Montgomery, and that said conveyance was voluntary, fraudulent and void as against the claim of the appellants. The appellee, William Sweeney, did not defend the action.

The appellee, M. D. Montgomery, in right of himself and of his infant daughter, Rosa, for whom he is guardian, defended the action upon several grounds: First. He relied on a former judgment rendered by the Washington Circuit Court against the appellants, in an action by them in said court against the appellees, by which appellants sought to subject said land to

the payment of said debt upon substantially the same grounds relied on in this action; second, that he, appellee, had tendered payment of said debt, interest and costs to appellants, which they refused; third, that appellee, William Sweeney, at the time the execution was in the hands of the sheriff, and at the time of its return, and since then, was the owner of property in Washington county, subject to execution, ample to pay said debt, interest and costs, which was known to the appellants, but they refused to have the same levied upon and sold; fourth, that the appellants and appellee, William Sweeney, fraudulently combined for the purpose of subjecting said land to the payment of said judgment for the purpose of depriving the appellee of his right of curtesy therein, and his daughter, Rosa, of her interest therein.

The lower court, on the trial of the cause, dismissed appellants' petition.

They have appealed to this court. The deed of conveyance, dated the 25th of January, 1878, by appellee, William Sweeney, to his daughter, Lucy D. Montgomery, recites the consideration for the conveyance to be "one dollar," and the further consideration of the love and affection the party of the first part bears to his daughter, the party of the second part." The conveyance is absolute.

That the appellee was liable as the guardian of the appellant, Sallie Yankey, for the amount reported in his settlement, and for which appellants recovered judgment at the time of said conveyance, there is no doubt. That there was no valuable consideration for the conveyance, and that it was purely voluntary, there is no doubt. The deed of conveyance so declares, and the proof in the case so establishes. That this conveyance is void according to chapter 44, section 2 of the General Statutes, as well as an unbroken line of decision of this court as to all of appellee William Sweeney's then existing liabilities, there is no doubt. And that the claim of the appellant, Sallie Yankey, was then an existing liability against the appellee, Sweeney, there is no doubt. And the tract of land should

have been subjected to the payment of appellants' judgment, unless M. D. Montgomery's defenses, or some one of them, are sufficient, which we will now notice.

His plea in bar by former adjudication is not sufficient, because when the appellants brought their first suit to subject the tract of land in question to the satisfaction of their claim, upon the ground that the conveyance to Mrs. Montgomery was voluntary, and, therefore, void and fraudulent as to the liabilities then existing against Sweeney, the vendor, they had not caused an execution to be issued on their judgment against Sweeney, and a return thereof by the proper officer "no property found." The issual of an execution on their judgment and return thereof "no property found" was a condition precedent to their right to maintain an action to subject said land to the payment of their judgment. Therefore, their action was premature and the court had no jurisdiction to hear and try the case upon its merits. And it is well settled that in order for a judgment to bar another suit founded on the same cause of action the first suit must have been decided on its merits. But if the trial of the first suit went off because of any technical defect or because the court had not jurisdiction to hear it upon its merits, then the judgment rendered will not bar a future action.

Tested by this rule the appellants' former action, although seeking the same thing as sought in this action—the subjection of the land in question to the payment of said debt—was premature, because the condition precedent to the appellants' right to maintain the action had not accrued, and the court, therefore, had no jurisdiction to hear the case upon its merits, and, it is presumed, dismissed it for that reason. Therefore, the plea in bar can not be sustained. Nor do the second and third pleas present a defense.

The fact that appellee Sweeney might have had property outside of that conveyed to Mrs. Montgomery subject to execution sufficient to pay said debt, and that the appellants, while the execution was in the sheriff's hands, knew it, and were advised to have it levied on by Montgomery, and failed

or refused to do so, or that appellant, John S. Yankey, and Sweeney, notwithstanding Sweeney had property outside of that conveyed to Mrs. Montgomery subject to execution sufficient to pay said debt, contrived to have the land in question subjected to the payment of said debt in order to deprive Montgomery of his marital rights therein, can not avail as a defense, because the conveyance to Mrs. Montgomery, being without any valuable consideration, was void as to the then existing liabilities of Sweeney, that is, the deed of conveyance passed to Mrs. Montgomery no title whatever to the land as against the then existing liabilities of Sweeney; as against those liabilities the land was the property of Sweeney, and subject to them as though no conveyance had been made, and might have been levied on and sold to satisfy them, notwithstanding the conveyance, and without reference to it. The appellants could have the land levied on and sold to satisfy their execution, notwithstanding the conveyance, without resorting to their suit in equity to subject it to their judgment.

Suppose they had resorted to this course, and Montgomery had said don't levy on and sell this land, as there is other property out of which the debt can be made; you will defraud me in my marital rights. The reply, that as to that debt the land was the property of Sweeney and subject to the execution, and that neither Montgomery nor his wife had any title to the land or any equity in it as against the debt, would be all-sufficient.

As to that debt Mrs. Montgomery was a mere volunteer, and had no right or equity in the land that could be violated by subjecting it to its payment.

For these reasons the appellants were entitled to a judgment for the sale of said land for the satisfaction of their judgment, and interest and costs.

The judgment of the lower court as to this case is reversed and the case remanded for further proceedings consistent with this opinion.

MONTGOMERY v. TURNEY'S ADM'R.

The appellee having brought an action to subject the same land mentioned in the above opinion to the satisfaction of a judgment on a debt which existed prior to said conveyance, and upon which judgment there was an execution issued and returned no property found, and the appellant having interposed substantially the same pleas as in the case just disposed of, and the lower court having rendered judgment subjecting said land to the satisfaction of said judgment, upon the principles above announced, the judgment is affirmed.

SWEENEY v. MONTGOMERY, &c.

In this case the appellee sought to obtain the possession of the tract of land mentioned in the first opinion herein from the appellant, upon the ground that his wife, Mrs. Montgomery, having died, and having had a child born alive by him, and he having reduced said land to actual possession during the lifetime of his wife, he was entitled to the possession thereof as tenant by the curtesy during his life.

The appellant denied that the appellee had reduced said land to his actual possession during the lifetime of his wife. The lower court having found in favor of the appellee the appellant has appealed to this court.

The facts are that after the appellant had conveyed the land to Mrs. Montgomery he continued to actually possess and control said land, and that appellee and his wife, at the time of said conveyance and during her life, lived with the appellant as members of the family, and were so living with the appellant at the time of the death of Mrs. Montgomery. Also that after the appellant conveyed the land to Mrs. Montgomery he continued to possess and control it from that time forward until her death; yet during that time his possession of the land was not hostile to the right of Mrs. Montgomery, but seemed to be in accordance with her right and title to it. So the question is, under these circumstances, has the appellee a life estate in the land?

Chapter 52, article 4, section 1, General Statutes, provides in substance that where there is issue of the marriage born alive the husband shall have an estate for his own life in all the real estate owned and possessed by his wife at the time of her death, or of which another may be then seized to her use.

It is well settled by repeated decisions of this court that a husband is not entitled to curtesy in the real estate of his deceased wife unless he has acquired the actual possession of such estate during her life.

It is required of the husband to take actual possession of his wife's land as a condition precedent to his right of curtesy therein, for the purpose of strengthening her title to it, and to protect it from intrusion and hostile possession, which might, by its continuance, endanger her title. This being the reason for the rule, whenever its equivalent is complied with, then the rule is complied with. For instance, if the guardian of the wife holds the possession of her land at the time of her death, then the reason of the rule is complied with, and the husband is entitled to curtesy in the land. And if a joint tenant with the wife holds the friendly possession of the land at the time of her death, here his possession is her possession, and the reason of the rule is complied with. So if a trustee of the wife holds the possession of the land for the wife at the time of her death, here also the reason of the rule is complied with, and the husband is entitled to curtesy. Indeed, if any person at the death of the wife is seized of her land for her use, the reason of the rule is complied with, and the husband is entitled to curtesy.

Now the appellant having conveyed the land in question to Mrs. Montgomery by an executed conveyance, and having held and possessed the land thereafter until her death, she and the husband living with him, not, however, in hostility to her right, but in accordance with it and friendly to it, such holding must be construed as for her use. Therefore, the reason of the rule in this case is complied with, and the appellee is entitled to curtesy in the land, subject, however, to the claims

of appellants, Yankey and wife, and the appellee, the administrator of Turney.

If the whole of said land is not exhausted by sale for the satisfaction of said two claims, then the appellee is entitled to curtesy in the remainder, and the judgment of the lower court is modified to that extent, and must be reversed.

MONTGOMERY v. SWEENEY.

The appellant instituted this action against the appellee to recover the possession of two tracts of land, one of seven acres and the other of 141 acres, upon the ground that he was entitled to a life estate therein as tenant by the curtesy of his wife, Lucy Montgomery, she having had issue of their marriage born alive, and died possessed of said tracts of land.

The record shows that on the 25th of January, 1878, the appellee conveyed to Lucy Montgomery these two tracts of land by separate deeds. The consideration expressed in each deed was that of natural love and affection borne by the appellee for his daughter, Lucy Montgomery, and the additional consideration that Lucy was to support and care for appellee and his wife during their natural lives. A lien was retained in each deed on the land therein conveyed as a security or indemnity for the support of appellee and his wife.

It is clear from the proof in the case that Lucy Montgomery was possessed of these tracts of land in the same way that she held the possession of the tract of land considered in the case just disposed of, and the same rule announced in that case is applicable to this.

The lower court in its judgment allowed the appellee the use and control of these two tracts during his life for a support, and, subject to this life use and control, sustained appellant's right of curtesy in both of the tracts of land. From that judgment appellant appealed to this court.

The record shows that appellant and appellee were very unfriendly, each accusing the other of harsh treatment, and the probabilities are that this estrangement will continue. And

the reasonable supposition is that appellee would not provide for the appellant's comfort and support with that kind consideration that his declining years demand.

We think, therefore, that the lower court did right in giving the appellee the exclusive use and control of the two tracts of land during her life. So far the judgment was right; but it did not go far enough in this. The appellee, in case the use and profits of the land should not be sufficient for his reasonably comfortable support during life, is entitled to have so much of the land itself as may be sufficient applied to that purpose, and the court in its decree should have reserved the right to appropriate so much of the land itself to the appellee's reasonable support and comfort in case the reasonable use and profits of the two tracts should not hereafter be sufficient for that purpose.

For this error alone the judgment is reversed and the case remanded, with directions to enter judgment in accordance with this opinion.

W. E. Selecman for Sweeneys and Yankey.

John W. Lewis for Montgomery.

COURT OF APPEALS ABSTRACTS.

HARDESTY v. GRAHAM.

SAME v. SAME.

Filed April 14, 1887. Appeal from Washington Circuit Court. Opinion of the court by Chief Justice Pryor, reversing former case and dismissing latter.

1. Accord and satisfaction—M. sold to H. land for which he still owed the purchase money to G., who had a lien therefor. G. instituted this action to enforce his lien, and obtained a judgment to sell the land. H., after paying on the judgment the amount which he owed to M. by reason of his purchase, executed to G. his note in settlement of the claim of G. that had been reduced to judgment, and by the terms of the agreement and the note the suit was to be dismissed when the note was paid. The note was paid by H., and the suit was stricken from the docket on motion of G. Six years thereafter G., upon notice, had the case reinstated on the docket, and claiming that the amount paid him failed to satisfy the judgment, asked and obtained a judgment for a sale of the land. H. in his response to the motion to reinstate set up the facts stated, and G. failed to deny any of the facts alleged except that he accepted the note as a satisfaction of his judgment. Held—That although there had been a judgment, still the facts presented by the defense were such as might well have been the basis of a settlement with one who was not primarily liable or in any manner personally bound for the debt, and as neither fraud nor mistake is alleged, and the note which has been paid shows the true character of the transaction, it is too late, after the lapse of six years, to make complaint.

2. Final order—An order overruling exceptions to a commissioner's report of sale is not a final order from which an appeal can be prosecuted, the report not having been confirmed.

W. E. Seecman and W. P. D. Bush for appellant; J. W. S. Clements and Hill & Rives for appellee.

JOHNSON, &c. v. JOHNSON.

Filed April 14, 1887. Appeal from Kenton Chancery Court. Opinion of the court by Judge Holt, reversing.

Granting of relief not prayed for—Appellant purchased from appellee, his brother, the latter's undivided interest in certain real estate inherited from their mother, the interest purchased having previously been sold under execution against appellee and purchased by G. Appellant, being the administrator of his mother, brought suit to sell her real estate, or as much of it as might be necessary, including the interest he had purchased from appellee, to pay her indebtedness. At the sale appellant became the purchaser of so

much of the real estate as was sold and obtained a commissioner's deed. Discovering that the deed embraced certain lots which had not been sold, and failed to embrace certain lots which had been sold, appellant brought this action to correct these errors, having previously bought the title to appellee's interest acquired by G. by virtue of his execution purchase, and received the sheriff's deed therefor. The lower court held that appellant, by accepting the sheriff's deed, and by having the interest of appellee in some of the lots sold in the suit to settle his mother's estate, and by purchasing that interest, and then bringing this suit to correct the errors in the proceedings, ignored his deed from appellee, and could no longer claim any right under it, and while the court granted the relief sought, it went further and decided issues not raised by the parties, directing an account to be taken of what appellee owed appellant, what the estate of his mother owed him, and of the value of the real estate purchased by him in the suit to settle his mother's estate.

Held—That this was error, as appellant, by bringing suit in his fiduciary capacity, and having the land sold and purchasing it, and by purchasing G.'s execution title, did not forfeit any right acquired by his purchase from his brother, and the error of the court in so holding was prejudicial, as some of the lots in which appellee had an interest were not sold in the suit to settle the estate, and while appellee's indebtedness to appellant appears to be greater than his interest in the unsold lots, the judgment gives appellant no lien therefor.

Simmons & Schmidt and J. F. & C. H. Fisk for appellants.

LOFTIN v. STROW, &c.

Filed April 14, 1887. Appeal from Marshall Circuit Court. Opinion of the court by Judge Lewis, affirming.

1. Actions—Amended petition—Appellees instituted an action to enforce a lien upon land which appellant had purchased after they acquired their lien, and upon which S. had a lien subordinate to theirs. Neither appellant nor S. was made a party to the action. Appellees became the purchasers at the sale made under the judgment rendered in that action, and obtained a writ of possession. Thereafter, on motion of appellees, the action was reinstated upon the docket and an amended petition filed, making appellant and S. parties, and asking for a judgment for the recovery of the land. The court ordered a resale.

Held—That while it would perhaps have been more regular for appellees to bring a new action, still as appellant and S. were duly summoned, and every opportunity given them to controvert the allegations made in the amended petition, and to set up whatever lien or claim they had, neither of them has been prejudiced. Nor is appellant prejudiced by the fact that the judgment appealed from directs a resale of the land, instead of awarding the possession to appellees, who acquired title to the land under the former judgment, since appellant may get the benefit of any surplus after paying the debt of appellees.

2. Transfer of actions—In view of the existence of the lien of S., which, though subordinate to that of appellees, he still had the right to assert, and of the claim of appellant under his purchase, the action was cognizable by a

court of equity. But even if it had not been, appellant having failed to move to transfer it to the ordinary docket, can not now complain.

J. M. Bigger and J. W. Dycus for appellant; Gilbert & Reed for appellees.

CLUTTER v. CLUTTER.

Filed April 21, 1887. Appeal from Campbell Circuit Court. Opinion of the court by Judge Holt, affirming.

Fraud—Relations of trust—Appellee seeks by this action to set aside a conveyance of real estate executed by him to appellant, his uncle, two days after he became of age. His guardian had died two years before that time, and he was living with and under the control of his uncle, as he had been since he was nine years of age, his uncle being to him in loco parentis. His uncle, the grantee, represented to him that he was the owner of but one-fifth of the land, and insists that this representation was true because appellee's father, from whom appellee obtained the land by devise, had purchased the land for the estate of his father, of which he was the administrator and one of the heirs, appellant being also one of the heirs. The court is of opinion, however, that the testimony shows that appellee's father purchased the estate for himself, and that appellee had not only the legal title to the whole of the land, but was entitled to hold it. The land was worth about \$2,000, but appellee parted with it in consideration of \$400. Appellant suppressed the fact that in any event his own interest was but one-fifth.

Held—That the relation existing between the parties was one of trust and confidence, and that the onus was, therefore, upon the appellant to show the entire fairness of the transaction, which he has failed to do. The bargain was an unconscionable one, and if not brought about by the misrepresentation of the appellant as to the interest of appellee in the property, was induced by the suppression of the truth by the appellant as to his own interest in it.

John S. Ducker for appellant; Ratliff & Ahlering and James C. Wright for appellee.

JOHNSON, &c. v. BARNES, &c.

Filed April 21, 1887. Appeal from Hardin Circuit Court. Opinion of the court by Judge Lewis, reversing.

1. Executions—Trusts—The interest of a cestui que trust in land is subject to sale under execution for the payment of his debts.

2. Res adjudicata—Appellant having purchased at execution sale the undivided interest of a cestui que trust in land, and received the sheriff's deed therefor, instituted this action to have the land divided, but the action was dismissed by the lower court. This court in 1876 reversed that judgment, the court being equally divided upon the question as to whether the title passed by virtue of the execution sale, but holding without a dissent that the plaintiff was entitled to a lien on the land for the amount bid. Upon the return of the cause appellant filed an amended petition asserting a lien. The action was again dismissed. Appellant then instituted another action,

but dismissed it upon his own motion, and prosecuted an appeal from the judgment dismissing the action. Upon the return of the case, limitation was pleaded, and the action was again dismissed. Held—That as the judgment of the lower court, in so far as it held that the title did not pass by virtue of the execution sale, was affirmed by this court upon the former appeal, though by a divided court, it must now, as to that question, be regarded as the law of this case, although this court has since held that the title does pass by virtue of such a sale.

3. Limitation—Appellant's right to sue for the amount bid by him and the enforcement of his lien did not accrue until the judgment was rendered in this action setting aside the sheriff's sale and deed, and as he, by amended petition, prayed for that relief within five years thereafter, the plea of limitation can not avail.

4. Abandonment of action—The institution by appellant of another action, which was dismissed on his own motion, can not be regarded as an abandonment of the original action so as to make the plea of limitation available.

W. P. D. Bush and Bush & Robertson for appellant; Wilson & Hobson for appellees.

HENDERSON v. CITY OF LOUISVILLE.

Filed April 16, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Chief Justice Pryor, reversing.

Contracts—In this action by a contractor to recover of appellee for "extra filling" in making an embankment this court held, upon a former appeal, that he was entitled to recover (4 Ky. Law Rep., 437), but as there was evidence tending to show that some of the dirt hauled had slid out with the soft mud at the bottom of the creek, and formed no part of the embankment, the court held that as to that the contractor must lose and not the city. The case having been returned to the lower court, the chancellor says he is unable to determine how much of this dirt slid off or how much was placed and remained in the embankment proper, and neither the engineer for the city nor the engineer for the plaintiff is disposed to make any statement that approximates accuracy. Held—That as the city engineer was present superintending the work, if he can form no estimate of the material lost in this way the city ought to lose it, and not the contractor.

Brown & Davie for appellant; T. L. Burnett for appellee.

CHAPMAN v. HEADLEY, EX'OR.

Filed April 16, 1887. Appeal from Lawrence Circuit Court. Opinion of the court by Chief Justice Pryor, affirming.

1. Ejectment—Trusts—In this action of ejectment the defense is that the plaintiff's vendor held the land in trust for defendant by reason of the fact that she had purchased it with the proceeds of the estate of her husband, defendant's father.

Held—That in order to defeat the recovery it must appear not only that the trust existed, but that plaintiff had notice thereof, and as neither the trust nor the notice is established the plaintiff is entitled to recover.

2. Executors—The plaintiff, who is the executrix of the last will of H., being invested by that instrument with the title to the testator's land, both in and out of this State, was the proper party to institute this action of ejectment for the recovery of the land in controversy, a part of the testator's estate, as it is alleged and not denied that the will was admitted to probate in the county and State of the testator's residence, and proved so as to pass the title to real estate in accordance with the law of this State.

Alexander Lackey for appellant; James McAuliffe for appellee.

SUPERIOR COURT ABSTRACTS.

NOE v. KEEN.

Filed March 9, 1887. Appeal from Washington Circuit Court. Opinion of the court by Judge Barbour, affirming.

Amended pleadings—After judgment, appeal and reversal it was too late for the defendant to file an amended rejoinder setting up facts known to him at the time of the first trial, and the court did not abuse its discretion in refusing to allow such an amendment to be filed.

J. W. S. Clements for appellant; John W. Lewis for appellee.

BRAUN v. MONROE.

Filed March 9, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, reversing.

Sureties—Limitation—The verbal promise of a surety to pay the debt, although the payee relies upon such promise, and in consideration thereof forbears to sue, does not prevent the statute of limitation from running in favor of the surety.

W. J. Perrin and J. T. Simon for appellant; J. W. Peck for appellee.

LOUISVILLE & NASHVILLE R. R. CO. v. KAUFMAN & CO.

Filed March 9, 1887. Appeal from Barren Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Bills of exceptions—Depositions—A deposition read to a jury can not be considered unless incorporated in the bill of exceptions, or made part of the record by an order of court.

2. Instructions—The court can not consider the instructions where only a part of the evidence is before the court.

3. General and special verdicts—It was not error for the court to order a general verdict in addition to the special verdict demanded by one of the parties.

4. Judgment on verdict—The mere fact that the special verdict is not suffi-

cient to base a judgment on does not render it inconsistent with the general verdict.

Wm. Lindsay and Porter & McQuown for appellant; A. Duvall for appellees.

COLVIN, &c. v. NEWELL, &c.

Filed March 9, 1887. Appeal from Pendleton Chancery Court. Opinion of the court by Presiding Judge Bowden, reversing.

1. Assignment--Parties to actions--The vendor of a chose in action not assignable must be a party to an action thereon; if he will consent he may join as plaintiff, but if he will not, the vendee, who is the real party in interest, can not join him as a plaintiff, but must make him a defendant.

2. Statute of frauds--A promise by A to pay B's creditor a sum of money which A owes B is not within the statute of frauds, and B's creditor may maintain an action thereon against A.

3. Promise for benefit of third person--Where a vendee as part consideration for land agrees to pay a debt of the vendor which is secured by a mortgage on the land, the promise is for the benefit of the mortgagee, the vendor's creditor, who may maintain an action thereon against the vendee without joining the vendor, to whom the promise was made.

4. Same--Such a contract may be rescinded by the parties who made it any time before the person for whose benefit it was made has asserted any rights under it, but in an action upon the contract a plea that it "had been abandoned" by the parties before suit was brought is not equivalent to a plea that it had been rescinded.

5. Limitation--The statute which provides that "an action upon a contract not in writing signed by the party, express or implied," shall be commenced within five years, means that an action upon an express or implied contract which is not in writing, or which, if in writing, is not signed by the party, shall be commenced within that time. Therefore, an action upon a promise by a grantee, embraced in a deed not signed by him, is barred, after five years, unless he has, within that time, expressly recognized the existence of the debt, which appears in this case to have been done.

6. Where there is an agreement by the vendee to pay the vendor's debt as a part consideration for the land, the amount then due becomes the debt of the vendee, and where such a contract was made under the conventional interest law, the vendee's contract to pay not being in writing signed by him, the amount due at the date of the contract bore only legal interest from that date, although the vendor's obligation was to pay to his creditor a greater rate of interest.

In this case the note the vendee agreed to pay bore 10 per cent. interest. The agreement was embraced in the deed which was not signed by him. Held--That the amount then due, counting interest at 10 per cent., was the amount he undertook to pay, and that amount, with 6 per cent. interest from that date he is liable for.

7. Mortgages--While as between mortgagor and mortgagee the legal title is in the latter for the mere purpose of creating a lien, it is in the mortgagor for all purposes whatever so far as third parties are concerned. When,

therefore, the mortgagor conveys, the effect of his deed is to pass the entire estate subject to the lien.

L. T. Applegate for appellants; J. T. Simon for appellees.

COMMONWEALTH v. COONS, COUNTY JUDGE, &c.

Filed March 9, 1887. Appeal from Mason Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Assessment for taxation by county court—Mandamus—The county court in requiring property to be listed for taxation under the provisions of sections 20, 22, 23 and 25 of article 5, chapter 92, General Statutes, acts judicially, and not ministerially as he does under the "Auditor's Agent Act;" therefore, mandamus will not lie to compel the county judge to assess property under the provisions of the General Statutes referred to.

2. Repeal of statute—The act of April 3, 1878, regulates the assessment, levy and collection of taxes imposed after its passage, and does not repeal the laws existing at the time of its enactment as to the mode of assessing, levying and collecting taxes previously imposed.

W. H. Julian for appellant.

ROACH v. ROYALL, &c.

Filed March 9, 1887. Appeal from Ohio Circuit Court. Opinion of the court by Judge Barbour, overruling motion.

Supersedeas—Damages—The Court of Appeals has adopted the rule that if at the time the opinion is delivered the record does not contain the supersedeas bond the court will not, upon the subsequent filing of the bond and motion therefor, award the damages. This court adopts the same rule.

C. W. Massie for appellant; Joe Haycraft for appellees.

**LEWIS AND MASON TURNPIKE ROAD CO. v. COMMONWEALTH,
MAYSVILLE AND ORANGEBURG ROAD CO. v. SAME.
MAYSVILLE AND MT. STERLING TURNPIKE ROAD CO. v. SAME.
HELENA TURNPIKE ROAD CO. v. SAME.**

**MAYSVILLE AND LEXINGTON TURNPIKE ROAD CO. v. SAME.
MAYSVILLE AND GERMANTOWN TURNPIKE ROAD CO. v. SAME.**

Filed March 9, 1887. Appeals from Mason Circuit Court. Opinion of the court by Presiding Judge Bowden, affirming.

1. Delinquent taxpayers—The proceeding under section 25, article 5, chapter 92 of the General Statutes, against delinquent taxpayers, is penal in its nature, and the defendant can prosecute an appeal under the provisions of chapter 2, title 9 of the Criminal Code.

2. Failure to list property—The sheriff in office may report failures to list property for taxation in years before he came into office.

3. The statute of limitation can not be invoked to escape an assessment of property for taxation.

4. Listing of property by county court—In a proceeding under section 23 of article 6, chapter 92, General Statutes, it is proper for the county court to direct the clerk to take the list.

Wadsworth & Son and Cochran & Son for appellants; W. H. Julian for appellee.

COMMONWEALTH, FOR USE, &c. v. FINCH, &c.

Filed March 16, 1887. Appeal from Boone Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Action on county levy bond—In an action against a sheriff and his sureties on his county levy bond the fact that a copy of the order of the county court fixing the county levy, filed as an exhibit, does not show who composed the court is immaterial, the exhibit not purporting to be a complete transcript of the proceedings in regard to the levy.

2. Liability of sureties—When the amount of the county levy is fixed and the list of tithables delivered to the sheriff and he collects them, the fact that the amount that each taxpayer was to pay and what he owed the county, etc., was not stated in the list, as required by the statute, will not relieve the sheriff and his sureties from liability to the county for what is shown upon a settlement to be due by him.

3. Parties to action—A receiver having been appointed by the county court to demand and collect the amount due from the sheriff on a settlement, it was proper that an action on the county levy bond to recover this amount should be brought by the receiver, and the fact that in bringing the action he brought it in the name of the "Commonwealth to the use of" the county court, "at the relation of" himself as receiver, does not prejudice the defendant.

S. W. Tolin for appellants; W. Montfort and J. J. Landrum for appellees.

LOUISVILLE & NASHVILLE R. R. CO. v. COX, &c.

Filed March 16, 1887. Appeal from Rookcastle Circuit Court. Opinion of the court by Judge Barbour, reversing.

1. Contributory neglect—There can be no recovery for negligence where the person injured was guilty of contributory negligence without alleging and proving willful neglect.

2. Peremptory instruction—Actions for negligence are governed by the same rules with reference to the power of the court to grant a non-suit that other actions are, and when there is no proof conducing to sustain the cause of action the court should give the jury a peremptory instruction to find for the defendant.

3. The speed of a train is not willful neglect as to one who has voluntarily placed himself on the track where he has no right to be.

4. Case adjudged—In this case the plaintiff's intestate was killed while walking over a trestle on appellant's road. It appears that as soon as he was seen, which was the earliest moment at which he could have been seen, steps were taken to stop the train. Held—In this action for ordinary negligence that the defendant's motion for a peremptory instruction should have been sustained, the plaintiff being guilty of contributory negligence.

Wm. Lindsay and Hill & Alcorn for appellant; W. O. Bradley and H. C. Harmon for appellees.

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WISE, &c., ON PETITION.

Filed March 16, 1887. Appeal from Trimble Circuit Court. Opinion of the court by Judge Barbour, affirming.

Decree to trade as feme sole—The court has no jurisdiction, upon the joint petition of husband and wife, to render a judgment empowering the wife to act as a feme sole, etc., until notice of the filing of the petition and the object thereof has been published as required by the statute. The only proof as to the sufficiency and publication of the notice recognized by the statute is "a copy of the notice and proof by affidavit of publication." The affidavit of the editor of the paper as to the publication giving the substance of the notice is not sufficient; it must be accompanied by a copy of the notice.

R. F. Peak for appellants.

PENNINGTON v. BALEE.

Filed March 16, 1887. Appeal from Davless Circuit Court. Opinion of the court by Judge Barbour, affirming.

Pleading—Although a reply states facts which should have been alleged in the petition or in an amended petition, if the defendant, instead of moving to strike such statements from the reply, joins issue upon them, he waives his right to object upon appeal that they should have appeared in the petition.

Owen & Ellis for appellant; G. W. Jolly and Williams & Son for appellee.

WILLIAMS v. WILLIAMS, ADM'R.

Filed March 16, 1887. Appeal from Louisville Chancery Court. Opinion of the court by Judge Ward, reversing.

Revivor—A divorced husband instituted this action asking that an allowance of alimony to the wife be suspended until the further order of the court.

The death of plaintiff having been suggested, the defendant moved the court to strike the case from the docket, to which motion the administrator of the plaintiff objected. The court overruled the motion to strike from the docket, but adjudged that the judgment for alimony, and this action to have it modified, abated and are not subject to be revived. The defendant having served notice on the plaintiff's administrator that she would do so, moved the court to set aside this order, which was refused, whereupon this appeal was taken. Held—That without a revivor of the action the court was not authorized to pronounce a final judgment, nor to say that a judgment it was asked to modify was no longer of any value because of the death of the judgment defendant.

W. C. Churchill and Bland Ballard for appellant; C. B. Seymour for appellee.

HUMPHREY v. WHITE, &c.

Filed March 16, 1887. Appeal from McLean Circuit Court. Opinion of the court by Judge Ward, affirming.

Bills of exceptions—Under the present Code of Practice, where the judge has refused to sign the bill of exceptions, or the verdict is assailed on the ground that it is not supported by the evidence, the appellate court will

not set aside the verdict unless the evidence is stated in full in the bill of exceptions.

In this case the bill of exceptions, in stating the testimony of the several witnesses, gives the name of the witness, and in each instance, except one, states that he "testified in substance." At the close of the bill it is stated: "This was all the evidence in the case." Held—That it appears that the testimony is not stated in full, and the court can not, therefore, consider whether the verdict is sustained by the evidence.

Wm. B. Noe for appellant; Jep. C. Johnson for appellees.

WILSON v. WRIGHT, &c.

Filed March 16, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Barbour, affirming.

Benefit societies—Liability of officer on bond—F. was elected "master of exchequer" of a lodge of Knights of Pythias in 1879, and annually thereafter until 1885. Although the constitution of this order required that this officer should give bond with security before entering upon the duties of his office, F. was not required to give bond until April, 1884, when he executed the bond sued on, the obligors covenanting that he would render an account for all money or other property that should come, or had already come, to his hands, "or is now in his hands." At the time he executed the bond he owed the lodge from \$400 to \$500. He had placed the money in his business, but this fact was not known either to the lodge or to his sureties. When his successor was elected in 1885 he owed the lodge \$880.17, of which he has paid \$500. This is an action on his bond to recover the balance. After his election in 1884, and while still in office, he paid out and received credit for more than \$800.

Held—First. F. was at least a de facto officer prior to the time he executed bond, and the sureties can not rely upon his failure to execute bond as a defense as to the money that came to his hands during that time.

Second. The order being a voluntary association, the court must assume that the lodge had the power to alter or amend the constitution so as to allow officers to act, though they might not execute bond as that instrument required.

Third. What F. owed the lodge when the bond was executed was, in legal contemplation, "in his hands" within the meaning of the bond, although the money was invested in his business, and his sureties are liable therefor.

Fourth. Even if the sureties were not liable for the past acts of F., as he, during the year 1884, paid more than he owed when elected for that year, and no application of those payments had been made, the court had the right to apply them to the past indebtedness, and having in effect done so, the judgment will not be disturbed.

Fifth. When there are long-running accounts, and debits and credits are perpetually occurring, and no balances are otherwise adjusted than for the mere purpose of making rests, payments ought to be applied to extinguish the debts according to the priority of time.

ABSTRACTS.

aver that the defendant promised to pay the debt, or facts from which the law will imply a promise or agreement to pay is upon a writing, the petition must aver that the defendant, agreed or promised to pay; if on an account, it must be aver was a promise to pay the amount demanded, or that the goods were of the value charged. Nor can the court look to the exhibits in the petition to supply the defective allegations.

In this action against P. upon a promissory note V. was named by an amended petition, and judgment asked against him, that he is liable as a joint purchaser with P. for goods for which was given. Held—That there is no allegation that the goods delivered to P. and V. as joint purchasers, nor that they were sums charged; no recovery can be had against V. as purchaser.

2. Guaranty—The plaintiff alleges that V. delivered a letter to P. delivered to plaintiffs before he purchased the goods, of which letter plaintiffs did give credit to P. Held—That the facts are not sufficient to authorize a recovery against V. as guarantor.

R. D. Davis and Thomas W. Mitchell for appellant; E. B. W. appellees.

HARBOR v. HARRIS' ADM'R.

Filed March 23, 1887. Appeal from Madison Court of Common Pleas, affirmed by the court by Judge Barbour, affirming.

1. Practice in civil cases—Section 648 of the Civil Code provides for the hearing of a motion for judgment upon a bond executed with personal property to suspend its sale under execution the court may issue such orders as it may prescribe, and as the court seems to have acted under that section, disregarding the writ of habeas corpus this court must assume that the court prescribed the proper procedure.

2. Same—Where the law and facts in an ordinary action were submitted to the court the appellate court can consider nothing except the pleadings to support the judgment, unless the judge states his conclusions of law and of fact, and the proper exception was taken. And even though it appears that this was done, nothing is considered except the pleadings, unless there was also a motion for judgment.

3. Same—Upon the trial of a motion for judgment upon a bond by a claimant of personal property to suspend its sale under execution the law and facts were submitted to the court, and the judgment was that the property levied on by the sheriff was liable to said execution having been part of the general estate of the wife and as such a demand of plaintiff." Held—That this is but a conclusion of fact and not a statement of fact found by the court.

W. B. Smith and C. H. Breck for appellant; C. F. & A. F. appellees.

J. I. Landes and Henry & Payne for appellant; Breathitt & Stites for appellees.

CHESAPEAKE & OHIO R. R. CO. v. CULLIVIER.

Filed March 16, 1887. Appeal from Bath Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

First—In an action to recover for an injury to the plaintiff's animal the measure of recovery is the difference between the value of the animal unhurt and hurt, and, when laid and proved, the cost of cure and loss of services while disabled; and the death of the injured animal from the effects of the injury does not enlarge plaintiff's right where the plaintiff had previously sold the animal, the fact of death in such a case being simply competent evidence to show the extent of the injury.

Second—In an action to recover for the negligent killing of an animal the plaintiff may recover for an injury to the animal, although death did not result therefrom.

In this case the plaintiff alleged that the defendant, by negligent management of its train, killed his mule. The defendant denied that the mule was killed, but admitted that it was struck and injured. The court, having tried the case, found facts showing negligence, and that the mule was worth at the time it was injured \$150; that the plaintiff kept it a month and then sold it for \$10, and that the mule died in December, 1884, the pleadings showing it was injured in August, 1884. The court rendered judgment for plaintiff for \$150.

Held—That these findings show that the plaintiff is entitled to recover, but do not authorize a judgment for the plaintiff for \$150, there being no finding as to the extent of the injury, or how much the value of the mule was affected by it. The mere fact that the plaintiff sold it for \$10 is not even evidence of diminished value, and there is no assessment of damages.

Breckinridge & Shelby and R. Gudgell & Son for appellant; J. J. Nesbitt for appellee.

HAYS v. RICHEY..

Filed March 16, 1887. Appeal from Barren Circuit Court. Opinion of the court by Judge Ward, reversing.

Attachment for rent—It was error in this case to sustain an attachment for rent, the only evidence offered to sustain the attachment being that the tenant had sold his tobacco crop and removed it from the premises, the tenant, the only witness, testifying that he sold it to raise money to pay his rent, and there being no evidence that there was not enough property on the leased premises to pay the rent.

Lewis McQuown for appellant.

VINCENT v. CALLIHAN & SONS.

Filed March 16, 1887. Appeal from Carter Circuit Court. Opinion of the court by Judge Ward, reversing.

1. Pleading—In an action to recover a debt, the petition to be good must

aver that the defendant promised to pay the debt, or facts must be stated from which the law will imply a promise or agreement to pay. If the suit is upon a writing, the petition must aver that the defendant, by the writing, agreed or promised to pay; if on an account, it must be averred that there was a promise to pay the amount demanded, or that the goods or services were of the value charged. Nor can the court look to the exhibit referred to in the petition to supply the defective allegations.

In this action against P. upon a promissory note V. was made a defendant by an amended petition, and judgment asked against him. It is claimed that he is liable as a joint purchaser with P. for goods for which P.'s note was given. Held—That there is no allegation that the goods were sold and delivered to P. and V. as joint purchasers, nor that they were worth the sums charged; no recovery can be had against V. as purchaser.

2. Guaranty—The plaintiff alleges that V. delivered a letter to P., which letter P. delivered to plaintiffs before he purchased the goods, upon the faith of which letter plaintiffs did give credit to P. Held—That these allegations are not sufficient to authorize a recovery against V. as guarantor.

R. D. Davis and Thomas W. Mitchell for appellant; E. B. Wilhoit for appellees.

HARBOR v. HARRIS' ADM'R.

Filed March 23, 1887. Appeal from Madison Court of Common Pleas. Opinion of the court by Judge Barbour, affirming.

1. Practice in civil cases—Section 648 of the Civil Code provides that upon the hearing of a motion for judgment upon a bond executed by a claimant of personal property to suspend its sale under execution the court may cause such issues to be tried as it may prescribe, and as the court in this case seems to have acted under that section, disregarding the written pleadings, this court must assume that the court prescribed the proper issues.

2. Same—Where the law and facts in an ordinary action were submitted to the court the appellate court can consider nothing except the sufficiency of the pleadings to support the judgment, unless the judge stated separately his conclusions of law and of fact, and the proper exception was taken at the time. And even though it appears that this was done, nothing can be considered except the pleadings, unless there was also a motion for a new trial.

3. Same—Upon the trial of a motion for judgment upon a bond executed by a claimant of personal property to suspend its sale under execution the law and facts were submitted to the court, and the judgment recites "that the property levied on by the sheriff was liable to said execution, the same having been part of the general estate of the wife and as such liable to the demand of plaintiff." Held—That this is but a conclusion of law, and not a statement of fact found by the court.

W. B. Smith and C. H. Breck for appellant; C. F. & A. R. Burnam for appellee.

SILVERIZER v. BRUNER.

Filed March 23, 1887. Appeal from Hancock Circuit Court. Opinion of the court by Judge Barbour, reversing.

Assignment—Attachment—H., by written contract, agreed to furnish the stone and build the foundation for a house F. was about to erect. After the stone had been quarried and delivered on the lot where the building was to be erected H., being indebted to appellant, assigned to her all his interest under the contract, and agreed to complete the work as per contract. H. proceeded with the work, and F. paid to appellant a part of the money due on the contract. Thereafter appellee sued out an attachment against H., and had it levied on such of the stone as had not been placed in the walls. F. executed a claimant's bond, and the stone levied on was used in the wall by H., who completed the contract. Thereafter appellant filed her petition claiming the attached property, and was made a party to the attachment proceeding. The court adjudged that the levy created a superior lien to appellant's claim on the stone. Held—That appellee, by virtue of his attachment, could acquire only such right as H. had at the time the attachment was obtained, and as H. had no right that he could voluntarily have transferred, appellee acquired no right by his attachment.

G. W. Williams & Son for appellant; N. A. Mason for appellee.

LEBUS v. ROBBINS.

Filed March 23, 1887. Appeal from Pendleton Circuit Court. Opinion of the court by Judge Barbour, affirming.

1. Sureties—Agreement for indulgence—While an agreement for delay between the creditor and the principal will not exonerate the surety unless it be a binding agreement upon sufficient consideration and enforceable by law, an agreement for indulgence upon the payment of interest in advance is a binding agreement upon sufficient consideration, and enforceable.

2. Same—An agreement to forbear to sue until a certain date is implied from the payment and receipt of interest to that date.

3. Abstract instructions—An erroneous instruction upon a purely abstract proposition having no application to the facts proved in the case will not authorize a reversal, as it is to be presumed that the verdict of the jury would have been the same in the absence of such an instruction.

There being no evidence in this case upon which an instruction upon the plea of payment could be based, an erroneous instruction upon that point does not authorize a reversal.

Martin & Ratcliffe for appellant; L. T. Applegate for appellee.

GREEN, &c. v. PEYTON, &c.

Filed March 23, 1887. Appeal from Christian Circuit Court. Opinion of the court by Judge Ward, reversing.

Guardian and ward—Constructive fraud—The good faith and honesty of purpose which the law presumes in ordinary contracts between strangers

must be made to appear in transactions between persons holding fiducial relations where the contract results beneficially to the fiduciary. Therefore, where a contract between guardian and ward results beneficially to the guardian, the burden rests on him to show the utmost fairness on his part.

A guardian in a settlement with his ward assigned to her two claims, which were then in suit and being contested. The ward was an ignorant infant married woman, whose husband was at the time in jail, and was soon afterward sent to the penitentiary. The guardian represented to the ward that the assigned claims amounted to about the same as her demand, when in fact they amounted to 23 per cent. less. The only evidence that the husband of the ward assented to the arrangement is that he signed the receipt to the guardian when presented to him in the penitentiary. Held—That the settlement should be set aside.

Harry Ferguson for appellants; Feland & Wood for appellees.

SANFORD v. CARR, TRUSTEE.

Filed March 23, 1887. Appeal from Kenton Chancery Court. Opinion of the court by Judge Ward, extending former opinion and affirming.

1. Pleading—Prayer for relief—When defense is made the plaintiff is not restricted to the specific relief which he asks, but may have judgment for other relief. Where there is no defense no relief can be given except that specifically asked for.

2. Defaulting receiver—Interest—In this agreed case upon a receiver's bond the agreed facts state that the receiver "is insolvent and has defaulted," but when he defaulted is not stated. The lower court allowed the plaintiff interest on the balance in the receiver's hands from the time the money was received. Held—That while interest should have been allowed only from the date of defalcation, yet as it is not agreed when that was, and the court can not say which party is in the wrong for not stating the date, there can be no reversal simply because a date might be alleged or agreed as the date of defalcation, which would fix the date from which interest should be allowed subsequent to the date fixed in the judgment.

3. Receivers should be allowed reasonable compensation, but when the receiver makes default and puts litigants to the delay and expense of suit to recover the sum in his hands this court will not reverse the chancellor's judgment, and direct him to make an allowance to a confessedly defaulting officer.

Hallam & Myers for appellant; O'Hara & Bryan for appellee.

HOUSE v. LEWIS' ADM'R.

Filed March 23, 1887. Appeal from Hancock Circuit Court. Opinion of the court by Presiding Judge Bowden, reversing.

Landlord and tenant—Pleading—In an action upon a written rental contract the plaintiff failed to state in his petition the substance of the terms of the contract, as he should have done; but the defendant, without objecting to the insufficiency of the petition, answered that the written contract

was rescinded prior to the time for which a recovery was sought, and further alleged that when the contract was rescinded it was agreed that in consideration of his surrender of one-half of the land he should have the use of the other half free of rent. The plaintiff persisted in asserting that the written contract had not been rescinded; that possession had been held under it, and that, therefore, he was entitled to recover the stipulated price. Held—That the defendant could have held the plaintiff to the written contract, proved a rescission and defeated a recovery altogether, but he was not obliged to do so, and, having tendered the issue as to whether he was liable for the use and occupation of the land, notwithstanding the rescission of the contract, the plaintiff could have accepted the issue thus tendered, and have sought a recovery for the use, but in order to do that he should have alleged the value of the use of that part of the land retained, and have asked judgment for that sum, but having failed to do that, the only question was whether the written contract had or had not been rescinded, and the evidence showing that it had been, there should have been no recovery. Upon the return of the case, if both parties desire to try the issue whether the defeat is liable for the use of the land, repleading should be permitted.

G. W. Williams & Son for appellant; Miller & Morrison for appellee.

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